deliberate steps to avoid complying with an affirmative duty to keep the MVA apprised of his current address and thus to shield himself from receiving notice from the MVA that his license had been suspended.

Similarly, in *Rice* v. *State*, (1) the defendant was convicted of a DUI and thus "had reason to believe that the MVA would . . . suspend his driving privilege"; (2) he failed to inform the MVA that he was living part time at another address; and (3) the MVA sent a notice of his suspension to his address. *Rice*, 136 Md. App. at 605-606.

In *Steward* v. *State*, this Court found that (1) the defendant knew her license would probably be suspended if she failed to attend a driver-improvement program; (2) the defendant did not have an address due to an eviction and subsequent homelessness but still "fail[ed] to contact the MVA to inquire about the status of her license"; and (3) the defendant "deliberately avoid[ed] contact with the MVA" by failing "to notify the MVA regarding her change in address for more than a year." *Steward*, 218 Md. App. at 562-563.

These cases all involved evidence of both prongs of willful blindness and show that the trial court's inquiry into what Mr. Woodall "should have known" was legally erroneous. The only issue is Mr. Woodall's knowledge—and, specifically, whether he actually believed that there was a significant possibility his license had been revoked and

whether he took deliberate steps to avoid learning this truth from the MVA.

II. THE STATE OFFERED NO EVIDENCE SUFFICIENT TO CONVICT MR. WOODALL OF KNOWINGLY DRIVING ON A REVOKED LICENSE

The State failed to put forward *any* evidence that a reasonable fact finder could rely on to find that, when driving on January 27, 2021, Mr. Woodall was willfully blind to the fact that his license was revoked. Fatal to the State's case, it offered no evidence that (a) Mr. Woodall received, or that the MVA even attempted to provide notice of the revocation hearing, such that the fact finder could infer that Mr. Woodall was aware of a substantial risk that his license had been revoked, or (b) Mr. Woodall took any steps to shield himself from the truth that his license had been revoked.

To support the knowledge element of Mr. Woodall's conviction, the State instead relies on conjecture. That conjecture fails in the face of the limited factual record, which includes no evidence that after Mr. Woodall's revocation was held in abeyance following his request for a hearing, the MVA provided any notice to Mr. Woodall that a hearing was scheduled, that Mr. Woodall took any action to avoid contact with the MVA, or that Mr. Woodall even failed to follow up with the MVA to in-

quire as to the status of the hearing he requested. Given the scant factual record in this case, the suggestion that the State has provided "ample evidence" of Mr. Woodall's guilty mind should be scrutinized carefully. Appellee's Br. at 6.

A. The State Offered No Evidence That Mr. Woodall Subjectively Believed His License Was Probably Revoked

The evidence on which the State relies does not establish that Mr. Woodall subjectively "believe[d] that it [was] probable" that his license was revoked on the date he was pulled over. *Rice*, 136 Md. App. at 601 (citation omitted).

1. On July 30, the MVA sent Mr. Woodall a point system revocation letter by certified mail as required under Maryland law. *See* R. 66; Md. Code Ann., Transp. § 16-404(b). The State describes this occurrence as Mr. Woodall "being notified of his license revocation." Appellee's Br. at 6. However, this notice did not revoke Mr. Woodall's license. Rather, the notice advised the recipient of his "right, within 10 days after the notice is sent . . . to file a written request for a hearing" and the revocation is not effective until the "end of the 10-day period after the notice is sent" "unless a hearing is requested" in which case the revocation is held in abeyance. § 16-404(b).

Upon receipt of that notice, Mr. Woodall timely requested a point system hearing, which resulted in the revocation being held in abeyance pending the hearing. R. 66. Accordingly, after Mr. Woodall responded to the July 30 notice, he reasonably (and correctly) believed that his license was *not* revoked. *See* Appellant's Br. 18. This is unlike what happened in *Rice* or *Steward* where the relevant notices were mailed, never collected and returned to the MVA. *See Id.* at 15-17.

2. After Mr. Woodall requested a hearing and his license was held in abeyance, the record indicates that the MVA went silent. A hearing was held on September 30, 2020 but there is no evidence that notice of this revocation hearing was sent to Mr. Woodall, despite the fact that such notice is required to be sent under Maryland law. *See* R. 66; Md. Code Ann., Transp. § 12-204(1). Moreover, following the hearing, the MVA revoked Mr. Woodall's license but the State offered no evidence that the MVA sent Mr. Woodall a notice of the revocation following the hearing—also required under Maryland law. *See* R. 66; Md. Code Ann., Transp. § 12-208(b).

3. Despite the absence of evidence that the MVA even attempted to give Mr. Woodall any subsequent notice after the July 30 notice, the State argues that, because Mr. Woodall had prior experience with a license suspension in 2019, he should have known that revocation

hearings are scheduled "promptly." Appellee's Br. 6-7. After a few months' time, so the State contends, Mr. Woodall had reason to believe that a hearing had been held and his license had been revoked. This argument fails.

As a threshold matter, Mr. Woodall's MVA record shows that the 2019 hearing was held approximately three months after a suspension letter was mailed to Mr. Woodall. *See* Appellant's Br. 26. The State's argument must be that "any rational fact finder could have found" beyond a reasonable doubt, that at one point between three and five months, Mr. Woodall's mental state surpassed negligence and recklessness and he became willfully blind to the fact that his license had been revoked. *See* Appellee's Br. 2-3. But this is conjecture unmoored in evidence. There is no willful blindness case the State can point to in which a similar lapse of time alone supported an inference that the defendant had a subjective belief that something was likely. *Cf. Steward*, 218 Md. App. at 563 (finding that the defendant knew the MVA would likely suspend her license due to a failure to attend required program); *Rice*, 136 Md. App. at 605-606 (finding that the defendant knew the MVA would likely suspend his license due to a recent DUI conviction).

Additionally, nothing about Mr. Woodall's 2019 MVA experience supports the proposition that revocation hearings inevitably result in a

license revocation through the time that Mr. Woodall was pulled over. In 2019, Mr. Woodall received a "point system revocation letter"; requested a hearing (which lead to the "revocation [being] held in abeyance"); and his license was "suspended" for one week. R. 65. If Mr. Woodall believed that the proceeding at issue occurred in the same way as his prior experience, his license would have been valid by the time he was pulled over on January 27, 2021.

Because the State offered no evidence of Mr. Woodall's *subjective* belief that his license was likely revoked when he was pulled over, and for this reason alone, Mr. Woodall's conviction should be reversed.

B. The State Offered No Evidence That Mr. Woodall Took Deliberate Steps To Avoid Learning That His License Was Revoked

The State must also show that Mr. Woodall took deliberate steps to avoid learning that his license was actually revoked. *See* Appellant's Br. 14-17. The State cannot point to a single piece of evidence that shows this. The State argues that Mr. Woodall should have taken some steps to inquire with the MVA (while assuming that Mr. Woodall did not do so despite the lack of any evidence that showed this) and that the MVA was unable to send additional notices to Mr. Woodall following the July 30 notice due to a speculated change of address that finds no support in the record.

1. The State argues that because Mr. Woodall is presumed to know the law, he knew that the hearing was required to be held within 30 days from when he requested the hearing and that failing to inquire after those 30 days have elapsed constitutes willful blindness. *See* Appellee's Br. 7-8; Md. Code Ann., Transp. § 12-203(b). However, under this reasoning, Mr. Woodall is also presumed to know that the revocation of his license was held in abeyance pending the hearing and that the MVA had a legal duty to notify him of the date and time of his hearing and, following the hearing, any adverse decision. *See* Md. Code Ann., Transp. §§ 16-404(b), 12-204(1), 12-208(b); *see also* R. 65-66. The State put forward no evidence that the MVA sent, or that Mr. Woodall received, any either a notice that the hearing was scheduled or a notice of the outcome of the hearing.

What is more, the State assumes that Mr. Woodall failed to inquire with the MVA. *See* Appellee's Br. 7-8. However, the State produced no evidence that shows Mr. Woodall failed to inquire with the MVA. But even if there was some evidence that Mr. Woodall did not follow up with the MVA, any such failure, without more, cannot amount to deliberate steps to avoid learning the truth where the law has imposed no affirmative duty to inquire with the MVA. Unlike in *Rice* and *Steward*, this is

not a case where the defendant failed to inform the MVA of a new permanent address as required by law. *See Rice*, 136 Md. App. At 605; *Steward*, 218 Md. App. At 561-562. There is no evidence from which a rational juror could find that Mr. Woodall's purported failure to inquire as to the status of his license is anything more than negligence.

2. In a last-ditch effort to save a conviction based on zero evidence of the requisite mens rea, the State concocts a theory out of whole cloth that Mr. Woodall failed to alert the MVA to a change of address. This theory is directly contradicted by Mr. Woodall's driving record—the same evidence that the State incredibly claims supports its theory. The State implies that a point revocation letter that was returned by the postal authority on August 19, 2020 was the same letter that was mailed on August 14, 2020—the letter initiating the MVA process at issue here. Appellee's Br. at 8; R. 66. Apart from the clear impossibility that a letter mailed on August 14, 2020 could be returned on August 19, 2020, merely three business days later, the MVA record clearly states that the letter returned on August 19, 2020 relates to a disposition in 2018—years before the disposition at issue in this case. R. 66. This is plainly not evidence that Mr. Woodall changed his address without notifying the MVA. What is more, the initial intent to revoke letter sent on August 14 was *received* by Mr. Woodall because he requested a hearing in response. R.

66. Because the initial notice of the intent to revoke was received by Mr. Woodall and he promptly responded by requesting a hearing, a fact finder cannot draw an inference from the record that Mr. Woodall failed to notify the MVA of an address change or took other actions to deliberately avoid contact with the MVA. The State's impossible reading of Mr. Woodall's driving record should not be credited.

DRAFT

CONCLUSION

For the foregoing reasons, the judgment below, finding Mr. Woodall guilty of driving on a revoked license, should be reversed.

Respectfully submitted,

MATTEO GODI
Assigned Public Defender
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP

PAUL B. DEWOLFE
Public Defender
MARYLAND OFFICE OF THE
PUBLIC DEFENDER

Counsel for Appellant
Steven Albert Woodall

APRIL __, 2022

Font: 13-point Century Schoolbook

Applicant Details

First Name	**Shawn**
Middle Initial	**A**
Last Name	**Shariati**
Citizenship Status	**U. S. Citizen**
Email Address	**ss4140@columbia.edu**
Address	**Address** Street **652 Dean Street, Apt. 1** City **Brooklyn** State/Territory **New York** Zip **11238** Country **United States**
Contact Phone Number	**516 770 6344**

Applicant Education

BA/BS From	**City University of New York-Queens College**
Date of BA/BS	**September 2009**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 18, 2017**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Human Rights Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**New York, Washington**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Covello, Matthew
matthew.covello@kingcounty.gov
Chess, Faye
judgefayechess@gmail.com
Eisenberg, Adam
adameisenberg@comcast.net

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Shawn Ashkan Shariati
652 Dean Street, Apt. 1
Brooklyn, NY 11238
(516) 770-6344
ss4140@columbia.edu

April 26, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto,

I am a public defender and a 2017 graduate of Columbia Law School, where I was a Harlan Fiske Stone Scholar and a member of the Columbia Human Rights Law Review. I am writing to apply for a 2025-2026 term clerkship in your chambers following a clerkship with Justice G. Helen Whitener of the Washington State Supreme Court for the 2023-2024 term.

Enclosed please find my resume, transcript, writing sample, and letters of recommendation from:

Supervisor Matthew Covello, (206) 477-8999, Matthew.Covello@kingcounty.gov
Judge Adam Eisenberg, (206) 684-8708, Adam.Eisenberg@seattle.gov
Judge Faye Chess, (206) 684-8712, Faye.Chess@seattle.gov

Should you need any additional information, please do not hesitate to contact me. Thank you for your time and consideration.

Sincerely,

Shawn Ashkan Shariati

Shawn Ashkan Shariati

652 Dean Street, Apt. 1
Brooklyn, NY 11238
(516) 770-6344
ss4140@columbia.edu

EDUCATION

Columbia Law School, New York, NY
J.D., 2017
Harlan Fiske Stone Scholar (for superior academic achievement)
Columbia Human Rights Law Review, A Jailhouse Lawyer's Manual
Challenging the Consequences of Mass Incarceration Clinic
Public Defender Students of Columbia Law School, *President*

The London School of Economics, London, UK
MSc., International Relations, 2011

Queens College of the City University of New York, New York, NY
B.A., Political Science and History, *cum laude*, 2009

EXPERIENCE

Washington State Supreme Court, Olympia, WA
Law Clerk to the Honorable G. Helen Whitener, Expected August 2023 – August 2024

The Legal Aid Society, New York, NY
Criminal Defense Practice Attorney, October 2019 – Present
Handled all aspects of criminal litigation, including arraignment, motion practice, trial, and probation hearings. Provided client-centered representation in collaboration with social workers, investigators, paralegals, and civil attorneys.

King County Department of Public Defense, Associated Counsel for the Accused, Seattle, WA
Attorney, August 2017 – August 2019
Handled all aspects of criminal litigation, including arraignment, motion practice, trial, contempt, and probation hearings. Provided client-centered representation in collaboration with social workers, investigators, paralegals, and civil attorneys. Handled all aspects of civil litigation concerning child support enforcement, at-risk youth, and child in need of services proceedings.

United States District Court for the Southern District of New York, New York, NY
Judicial Extern to the Honorable Valerie Caproni, January 2017 – April 2017
Conducted legal research, prepared memos, and drafted opinions concerning such topics as habeas corpus, sentencing, civil procedure, employment law, and copyright law.

The Bronx Defenders, New York, NY
Criminal Defense Practice Extern, September 2016 – December 2016
Helped attorneys representing clients in criminal proceedings. Prepared motions concerning facial insufficiency, speedy trial, suppression, and prosecutorial misconduct.

Family Defense Practice Intern, August 2016
Assisted attorneys representing clients in dependency proceedings. Prepared motions and memos concerning various sections of New York's Family Court Act.

The Legal Aid Society, New York, NY
Criminal Defense Practice Intern, June 2016 – August 2016
Supported attorneys representing clients in criminal proceedings. Prepared subpoenas. Wrote memos and motions concerning facial insufficiency, severance, speedy trial, and suppression. Represented clients charged with misdemeanors pursuant to New York's student practice order.

Neighborhood Defender Service of Harlem, New York, NY
Criminal Defense Practice Extern, September 2015 – May 2016
Helped attorneys representing clients in criminal proceedings. Represented clients charged with misdemeanors pursuant to New York's student practice order.

Orleans Public Defenders, New Orleans, LA
Law Clerk, May 2015 – August 2015
Assisted attorneys representing clients in criminal proceedings. Prepared various motions and memos concerning suppression and evidentiary rules.

New York Civil Liberties Union, New York, NY
Legal Intake Committee Member, January 2014 – August 2014
Managed the intake of and correspondences with clients. Aided attorneys with class action lawsuits concerning New York's criminal legal system.

Filipino American Legal Defense & Education Fund, New York, NY
Legal Assistant, September 2012 – May 2014
Helped attorneys representing clients with immigration issues. Created and

managed pro bono immigration legal clinics in collaboration with other non-profit organizations and bar associations.

Haitian Family Resource Center, New York, NY
Legal Assistant, July 2012 – September 2012
Assisted attorneys representing clients with immigration issues. Helped prepare community events in collaboration with local churches.

United Nations – Department of Political Affairs, New York, NY
Intern – Office of the Assistant Secretary-General, June 2011 – October 2011
Produced reports on political and security developments around the world. Managed the intake of correspondences from governments and other UN missions. Prepared talking points for the Secretary-General during the meeting of the General Assembly.

MEMBERSHIPS

Middle Eastern Legal Association of Washington, *Vice President*, 2018-2019

BAR ADMISSIONS

Washington

New York

COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK

NAME: Shawn Ashkan Shariati
SSN#: XXX-XX-2203
SCHOOL: SCHOOL OF LAW

DEGREE(S) AWARDED: Juris Doctor (Doctor of Law)
DATE AWARDED: May 17, 2017
PROGRAM: LAW

HARLAN FISKE STONE SCHOLAR-SECOND YEAR ENDING MAY 16

SUBJECT	COURSE NUMBER	TITLE	POINTS	GRADE
Fall 2014				
LAW	L 6101	CIVIL PROCEDURE	4.00	B+
LAW	L 6105	CONTRACTS	4.00	B+
LAW	L 6113	LEGAL METHODS	3.00	CR
LAW	L 6115	LEGAL PRACTICE WORKSHOP I	1.00	P
LAW	L 6118	TORTS	4.00	B+
Spring 2015				
LAW	L 6108	CRIMINAL LAW	3.00	B
LAW	L 6116	PROPERTY	4.00	B
LAW	L 6121	LEGAL PRACTICE WORKSHOP I	1.00	P
LAW	L 6133	CONSTITUTIONAL LAW	4.00	B
LAW	L 6183	US & INTL LEGAL SYSTEM	3.00	B+
LAW	L 6679	FOUNDATION YEAR MOOT COUR	0.00	CR
Fall 2015				
LAW	L 6109	CRIMINAL INVESTIGATIONS	3.00	B+
LAW	L 6238	CRIMINAL ADJUDICATION	3.00	B+
LAW	L 6250	IMMIGRATION LAW	3.00	B+
LAW	L 6655	HUMAN RIGHTS LAW REVIEW	0.00	CR
LAW	L 6656	EXTERNSHIP: COMMUNITY DEF	2.00	CR
LAW	L 6656	EXT:COMMUNITY DEFENSE-FLD	2.00	CR
Spring 2016				
LAW	L 6241	EVIDENCE	4.00	B+
LAW	L 6269	INTERNATIONAL LAW	3.00	B+
LAW	L 6359	PROFESSIONAL RESP IN CRIM	3.00	A
LAW	L 6655	HUMAN RIGHTS LAW REVIEW	0.00	CR
LAW	L 6656	EXTERNSHIP: COMMUNITY DEF	2.00	CR
LAW	L 6656	EXT:COMMUNITY DEFENSE-FLD	2.00	CR
LAW	L 8785	READG GRP-ROLE PUB DEFENDER	1.00	CR
Fall 2016				
LAW	L 6483	REAL ESTATE TRANSACTIONS	3.00	B
LAW	L 6655	HUM RIGHTS LAW REV EDIT B	1.00	CR
LAW	L 6675	MAJOR WRITING CREDIT	0.00	CR
LAW	L 6792	EXT:BRONX DEFENDRS-HOLSTC	2.00	B+
LAW	L 6792	EXT:BRONX DEFENDRS-FIELD	2.00	CR
LAW	L 6927	REAL ESTATE DEVELOPMENT	2.00	B
LAW	L 8887	S 9/11 & RIGHTS/NON-CITIZ	2.00	B+
LAW	L 9175	S TRIAL PRACTICE	2.00	B+
Spring 2017				
LAW	L 6655	HUM RIGHTS LAW REV EDIT B	1.00	CR
LAW	L 6661	EXT:FED CT CLERK SOUTHERN	1.00	CR
LAW	L 6661	EXT:FED CT CLERK SDNY-FLD	3.00	CR
LAW	L 6672	MINOR WRITING CREDIT	0.00	CR
LAW	L 9172	SEM-ADVANCED TRIAL PRACTI	2.00	A-
LAW	L 9256	MASS INCARCERATION CLINIC	3.00	B+
LAW	L 9256	MASS INCARCERATN CLNC-PRJ	4.00	CR

This official transcript was produced on
MAY 19, 2017.

SEAL OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK

Barry S. Kane
Associate Vice President and University Registrar

April 26, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

My name is Matthew Covello, I am the attorney supervisor for the Seattle Municipal Court Unit of King County Public Defense/ACAD. This letter is a recommendation for Shawn Shariati as an attorney. I supervised Mr. Shariati, in full capacity, for several years.

He was a team player, always volunteering to assist when necessary. He was also a leader and assisted me in running a very large and complex unit of public defenders.

Mr. Shariati has proven to be a competent, diligent, and self-motivated public defender. He represented clients at all levels of criminal proceedings (arraignment through review/probation hearings) and did so without incident. He did not receive a single complaint even though he represented literally hundreds of clients during this time.

It is important to note that Seattle Municipal Court is the largest court by volume in the region, and has a very high percentage of clients who suffer from mental health, addiction, and homelessness. These can be some of the most difficult clients to deal with, and Mr. Shariati interacted with these clients as though he was a veteran public defender.

Mr. Shariati showed good writing skills and is a competent advocate. He is eager to learn the law and was a “team player” during his time in our office. He was also well-liked by the staff, attorneys, and support staff alike. There were no incidents of concern during the time that he was employed at King County.

I did not want him to leave our office and would want to hire him if he wished to return. Please contact me if you have any further questions.
Sincerely,

Matthew Covello
Attorney Supervisor, Seattle Municipal Court and Interim Senior Supervisor
(206) 477-8999
matthew.covello@kingcounty.gov

April 26, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

It is my pleasure to recommend Shawn Shariati for a clerkship.

I sit as a judge on Seattle Municipal Court, which is a court of limited jurisdiction in Seattle, WA. As an attorney for the Associated Counsel for the Accused (ACA) for King County Department of Public Defense, Shawn routinely appeared in front of me on court matters ranging from trials, arraignments, pre-trial hearings, sentencing hearing, and review hearings.

Shawn is well versed on Washington State laws. He generated well-developed and comprehensive defenses for his clients. I know Shawn to be of high intelligence and good character. He approached his work at ACA with due diligence, taking pride in honest representation, and excellent work ethics. Shawn demonstrated that he could work collaboratively with the court's participants, e.g., prosecutors, probation officers, police officers, defense attorneys, and community organizations in order to create an equitable and accessible criminal justice system.

Shawn will assist you greatly with the achievement of goals and objectives set forth by your chambers. I believe Shawn is regarded as attorney who committed to the rule of law and dedicated to making sure that courts of law are considered an independent and coequal branch of government which is accessible to the public and provides fair and impartial justice.

I have no doubt Shawn will be an invaluable asset to your court. If you would like to speak directly to me about Shawn's candidacy, please feel free to contact me.

Sincerely,

Judge Faye R. Chess

Faye Chess - judgefayechess@gmail.com

ADAM EISENBERG
JUDGE

August 15, 2022

To Whom It May Concern:

It is my honor to write a letter of recommendation for Shawn Shariati for a Federal clerkship. I believe he is an excellent attorney, and he would do a fantastic job working for a Federal judge.

Seattle Municipal Court handles all misdemeanors and gross misdemeanors that occur in the City of Seattle. From August 2017 to August 2019, Mr. Shariati appeared as a public defender in my court on a regular basis. He was always well prepared for his cases, extremely professional toward court staff and opposing counsel, and advocated strongly and effectively for his clients. He also demonstrated a keen knowledge of the law, and a creative flair when it came to presenting legal arguments before the court.

Mr. Shariati is a very compassionate attorney and human being. Many of his clients struggled with mental health and drug issues, and he was frequently placed in the very difficult position of having to advocate per his clients' wishes even when those might be contrary to their health and well-being. He always accomplished this with great skill and sensitivity.

Ultimately, I have great respect for Mr. Shariati's skill and talents as an attorney, and I'm certain he will shine in any clerkship.

Yours sincerely,

Adam Eisenberg
Presiding Judge, Seattle Municipal Court

Seattle Municipal Court, P.O. Box 34987, Seattle, WA 98124-4987
Telephone: (206) 684-5600
seattle.gov/courts

Writing Sample

Shawn Ashkan Shariati
652 Dean Street, Apt. 1
Brooklyn, NY 11238
(516) 770-6344
ss4140@columbia.edu

Attached are two writing samples.

1. An opinion denying a motion on procedural grounds.
2. A motion to suppress evidence and dismiss a criminal case.

Sample #1

QUARK *v*. UNITED STATES

AARON SATIE, United States District Judge:

Quark ("Petitioner"), proceeding *pro se*, moves to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (hereafter, "Pet'r Mot."), Dkt. 1. For the following reasons, Petitioner's Motion is DISMISSED as untimely.

BACKGROUND

Petitioner pled guilty to the crimes of conspiracy to commit access device fraud and aggravated identity theft in connection with a scheme involving fraudulently obtained debit and credit cards. Transcript of March 10, 2014 Court Appearance (hereafter, "March 10 Tr."), *United States v. Rom*, No. 13 CR. 795 (AS), (S.D.N.Y. 2013), Dkt. 54, at 27. On July 22, 2014, this Court sentenced Petitioner to time served for the conspiracy count and two years imprisonment for aggravated identity theft, to run consecutively to the conspiracy sentence. Transcript of July 22, 2014 Court Appearance (hereafter, "July 22 Tr."), *Rom*, Dkt. 78, at 24–26. Additionally, the Court ordered Petitioner to pay approximately $17,000 in forfeiture and a similar amount in restitution. *Id*. Judgment was entered on July 22, 2014. Judgment, *Rom*, Dkt. 77 at 1. Petitioner did not pursue a timely direct appeal of his conviction.[1] Order on Motion for Leave to Appeal (hereafter, "Leave to Appeal Order"), *Rom*, Dkt. 97, at 2.

On September 21, 2015, Petitioner filed a motion seeking relief pursuant to 28 U.S.C. § 2255, under the grounds that he received ineffective assistance of counsel. Pet'r Mot. At 1; Memorandum of Law in Support Motion to Vacate, Set, Aside or Correct Sentence (hereafter, "Pet'r Mem."), Dkt. 2,

[1] On October 19, 2014, Petitioner filed a motion for leave to file a late notice of appeal pursuant to the Federal Rules of Appellate Procedure Rule 4(b)(4). Motion to File Late Notice of Appeal (hereafter, "Mot. Late Appeal"), Rom, Dkt. 87, at 1. Petitioner's motion was denied on March 11, 2014. Leave to Appeal Order at 2.

at 1. Petitioner asserts that he received ineffective assistance because his counsel: (1) forced him to plead guilty despite the Government's "failure to show that Petitioner knowingly committed aggravated identity theft," and (2) did not contest the "improper imposition of forfeiture as restitution." Pet'r Mem. At 2.

On October 16, 2015, this Court directed Petitioner to show cause as to why his motion should not be denied as time-barred. Order Directing Affirmation (hereafter, "Order"), Dkt. 4 at 2. Petitioner subsequently filed an Affirmation stating that his lateness was due to: (1) inadequate access to prison library resources; (2) language barriers; and (3) denial of access to his legal files. Affirmation, Dkt. 5, at 1–3. On February 14, 2016, the Government filed a memorandum in opposition to the Petitioner's Motion, arguing that Petitioner's motion is procedurally barred as untimely under the Antiterrorism and Effective Death Penalty Act of 1996 (hereafter, "AEDPA") and that the Petitioner's counsel was not ineffective. Memorandum of Law of the United States in Opposition to Petitioner's Motion Pursuant to 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct His Sentence (hereafter, "Gov. Mem."), *Rom*, Dkt. 130, at 15–26.[2]

DISCUSSION

AEDPA established a one-year statute of limitations for the filing of a motion pursuant to 28 U.S.C. § 2255. *See* 28 U.S.C. § 2255(f). A Section 2255 motion is timely only if it is filed within one year from the latest of: (1) the judgment of conviction becoming final; (2) a government-created impediment to making such a motion being removed; (3) the right asserted being initially recognized by the Supreme Court, if the right has been made retroactively applicable to cases on collateral review; or (4) the facts supporting the claims being discoverable through the exercise of due diligence. *See* 28 U.S.C. § 2255(f). Because Petitioner has not alleged that the Government impeded the filing of his

[2] The Government mistakenly filed their Memorandum of Law in Opposition of Petitioner's Motion in *United States v. Rom*, No. 13 CR. 795 (AS), (S.D.N.Y. 2013).

motion, that the Supreme Court has recently recognized any rights he his asserting, or the discovery of any new facts supporting his claim, the relevant date for calculating the statute of limitations is the date on which the judgment of conviction became final.

"[A]n unappealed federal criminal judgment becomes final when the time for filing a direct appeal expires." *Moshier v. United States*, 402 F.3d 116, 118 (2d Cir. 2005). Because a criminal defendant must file a notice of appeal within fourteen days after the entry of judgment, an unappealed conviction becomes "final" for the purposes of the one-year AEDPA limitations period fourteen days after judgment is entered. *See* Fed. R. App. P. 4(b).

Judgment was entered in Petitioner's criminal case on July 22, 2014, and Petitioner did not pursue a timely direct appeal of his conviction. Leave to Appeal Order at 2. Therefore, Petitioner's conviction became final on August 5, 2014. To be timely Petitioner's motion must have been filed on or before August 5, 2015. Petitioner's motion, which was dated August 31, 2015, Pet'r Mot. At 14, is therefore untimely.[3]

The one-year statute of limitations for Section 2255 motions may be equitably tolled. *Green v. United States*, 260 F.3d 78, 82 (2d Cir. 2001). Equitable tolling is available only in rare and exceptional circumstances. *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000). To equitably toll the statute, the petitioner must establish that (a) "extraordinary circumstances" prevented him from filing a timely motion, and (b) he acted with "reasonable diligence" during the period for which he seeks tolling. *Martinez v. Superintendent of E. Corr. Facility*, 806 F.3d 27, 31 (2d Cir. 2015).

Petitioner argues that his motion should not be time-barred because he had inadequate access to prison library resources, is unable to read or write English, and was unable to procure his legal files from counsel. Affirmation

[3] The Second Circuit recognizes the "prison mailbox rule," which states that a *pro se* prisoner "satisfies the time limit for filing a notice of appeal if he delivers the notice to prison officials within the time specified." *Noble v. Kelly*, 246 F.3d 93, 97 (2d Cir. 2001). Thus, although Petitioner's habeas motion was not received by this Court until September 21, 2015, the Court will consider the motion to have been filed on August 31, 2015.

at 1–5. Although the Court is sympathetic to Petitioner's circumstances, Petitioner's reasons do not provide a basis for equitable tolling. *See, e.g., Grullon v. United States*, No. 05 CIV. 1810 (DAB), 2007 WL 2460643, at *1 (S.D.N.Y. Aug. 27, 2007) (restricted prison law library access is not a "circumstance so rare or exceptional to warrant any tolling of the statute of limitations."); *Zhang v. United States*, No. 01 CIV. 2591 (DAB), 2002 WL 392295, at *3 (S.D.N.Y. Mar. 13, 2002) (limited knowledge of the English language, absence of legal assistance program at the correctional facility, and inability to communicate with assistants at the law library insufficient grounds for equitable tolling); *Davis v. McCoy*, No. 00 CIV. 1681 (NRB), 2000 WL 973752, at *2 (S.D.N.Y. July 14, 2000) ("inability to obtain documents does not rise to the level of extraordinary circumstances").

CONCLUSION

For the foregoing reasons, Petitioner's 28 U.S.C. § 2255 motion is time-barred because it was not timely filed, and Petitioner has not established that he is entitled to equitable tolling. Therefore, Petitioner's motion is DISMISSED.

When a motion is denied on procedural grounds, the petitioner may obtain a certificate of appealability if he shows "that jurists of reason would find it debatable whether the motion states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Eltayib v. United States*, 294 F.3d 397, 400 (2d Cir. 2002). Because the late filing of this motion is not debatable, the Court declines to issue a certificate of appealability.

Sample #2

Shawn Ashkan Shariati
Attorney for Julian Bashir

Municipal Court
For the City of Seattle, Washington

City of Seattle, Plaintiff; v. **Julian Bashir**, Defendant	Case No. DS9-000 **Motion to Suppress and Dismiss**

The Defense moves for the following:

1. Dismissal of count 1, Driving Under the Influence ("DUI"), because the police lacked probable cause for the crime at the time of Mr. Bashir's arrest.

2. Dismissal of both counts 1, Driving Under the Influence, and 2, False Reporting, because the Prosecution will be unable to meet their burden of production with the suppression of unlawfully gathered statements.

Sample #2

FACTS

Officers J'Dan and Duras were on bike duty, patrolling the neighborhood of Belltown, watching the bars close after the New Year's celebration on January 1, 2018. *See* GO#2018-000000, Page 10 of 51. Around 2 A.M., they were dispatched to the intersection of First Avenue and Bell Street, where a woman was allegedly pushed out of a car. *Id*. They came upon the scene and saw a woman, Jadzia Dax, laying on the road, crying and unintelligible, and a man, Julian Bashir, trying to help Jadzia up.

Officer J'Dan tended to Jadzia in the street, and spoke with a witness on the scene, Kira Nerys. Kira told Officer J'Dan that she witnessed a woman being pushed out the passenger side of a car, followed by a guy getting out of the same car, trying to get the woman back inside the car. *See* AXON_Body_2_Video_2018-01-01_0215-file 5, at 2:55. Kira did not see who was driving the car. *Id*.

In almost no time, there were approximately seven officers on the scene: T'Kuvma, Kahless, Worf, Mogh, Noggra, Duras, and J'Dan. *See* GO#2018-000000, Page 20 of 51. Surrounded by officers, Mr. Bashir was questioned about what happened in the car. When first asked for his name, Mr. Bashir gave the name Benjamin Sisko, *See* AXON_Body_2_Video_2018-01-01_0215, at 2:45. After intense questioning about his name, an officer yelled at Mr. Bashir, "he's lying about his name and he has a warrant." *See* AXON_Body_2_Video_2018-01-01_0215, at 8:45. Mr. Bashir was clearly not free to leave, surrounded by officers who would arrest him on a warrant. *See* AXON_Body_2_Video_2018-01-01_0215, at 9:55. Officers continued to question Mr. Bashir about his name and they knew the answers would likely be self-incriminating. Mr. Bashir ultimately gave his name soon after being

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yelled at. *See* AXON_Body_2_Video_2018-01-01_0215, at 10:08. Mr. Bashir was never given a *Miranda* warning.

The officers moved their investigation from the crime of False Reporting to the crime of Driving Under the Influence. This investigation occurred even though no officers or civilian witnesses observed Mr. Bashir driving. *See* AXON_Body_2_Video_2018-01-01_0215, at 11:00. Sometime later the "DUI officer," Officer Gowron, arrived at the scene. Officer Gowron directed Mr. Bashir to the sidewalk and began questioning him to investigate a possible DUI. *See* AXON_Body_2_Video_2018-01-01_0229, at 2:40. Mr. Bashir, in response to questioning, told Officer Gowron he had "two shots." *See* AXON_Body_2_Video_2018-01-01_0229, at 4:00. Officer Gowron told Mr. Bashir "I'd like to do some field sobriety tests with you." *See* AXON_Body_2_Video_2018-01-01_0229, at 4:15. First, Officer Gowron administered the horizontal gaze nystagmus test ("HGN"), which Mr. Bashir completed. *See* AXON_Body_2_Video_2018-01-01_0229, at 5:03. Then Officer Gowron then administered the walk and turn test. *See* AXON_Body_2_Video_2018-01-01_0229, at 7:05. As Officer Gowron explained the test, Mr. Bashir interrupted Officer Gowron to inform him about a physical condition. *See* AXON_Body_2_Video_2018-01-01_0229, at 8:01. Mr. Bashir had surgery on his feet. *Id*. One is longer than the other, and he had mobility and balance problems because of it. *Id*. After Mr. Bashir completed the walk and turn test, Officer Gowron attempted to explain the portable breath test ("PBT") to Mr. Bashir and asked him to take it: "I got one last thing, it's a voluntary test, it's a PBT, the portable breath tester, you're gonna do that?" *See* AXON_Body_2_Video_2018-01-01_0229, at 9:02. Mr. Bashir agreed and gave a breath sample. *See* AXON_Body_2_Video_2018-01-01_0229, at 10:02. When the results of the PBT came in, Officer Gowron said, "it's a little higher than I expected it to be." *See* AXON_Body_2_Video_2018-

Sample #2

01-01_0229, at 10:20. Mr. Bashir was cuffed soon after, and after he was searched, he was given the *Miranda* warning. *See* AXON_Body_2_Video_2018-01-01_0229, at 12:18.

ARGUMENT

1. The Court must dismiss count 1, Driving Under the Influence, because the police lacked probable cause for the crime at the time of arrest.

An arrest is constitutionally valid when, at the moment the arrest was made, the officer had probable cause to arrest, and at that moment, facts and circumstances within the officer's knowledge, and of which the officer had reasonably trustworthy information, were sufficient to warrant a prudent man in believing that the defendant had committed or was committing an offense. *Beck v. State of Ohio*, 379 U.S. 89, 91 (1964). In a DUI arrest, the question is whether the investigating officer, at the time of the arrest, had knowledge or reasonably trustworthy information that the defendant was driving a motor vehicle while under the influence. *O'Neill v. Department of Licensing*, 62 Wash. App. 112, 116 (Div. 1 1991).

1.1. The PBT results cannot be considered for the purposes of probable cause because they were administered in violation of Washington Administrative Code ("WAC") 448-15-030.

WAC 448-15-030 describes the "policies and procedures approved by the state toxicologist" that an operator of the PBT must follow. If the policies and procedures approved by the state toxicologist are not followed, the results of the test are not valid. *State v. Smith*, 130 Wash. 2d 215, 221 (1996).

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One of the "policies and procedures" is an officer administering the PBT must advise the subject, prior to the test, that: (1) it is a voluntary test, and (2) it is not an alternative to any evidential breath alcohol test. WAC 448-15-030(1).

When Officer Gowron brought up the PBT to Mr. Bashir, he said, "I got one last thing, it's a voluntary test, it's a PBT, the portable breath tester, you're gonna do that?" See AXON_Body_2_Video_2018-01-01_0229, at 9:02. Officer Gowron failed to mention that the PBT "is not an alternative to any evidential breath alcohol test," which is required by WAC 448-15-030. Because the test was done in violation of WAC 448-15-030, the results are not valid and cannot be considered for purposes of probable cause.

1.2. The field sobriety tests ("FST") results cannot be considered for purposes of probable cause because they were not voluntary.

There is "no legal obligation to perform a field sobriety test." *City of Seattle v. Personeus*, 63 Wash.App. 461, 465–66 (1991). A suspect's right to refuse a field sobriety test is based in common law. *City of Seattle v. Stalsbroten*, 138 Wash.2d 227, 236–37 (1999). Therefore, field sobriety tests are voluntary and are subject to constitutional requirements concerning voluntariness. Statements must be the "product of an essentially free and unconstrained choice by its maker." *Schneckloth v. Bustamante*, 412 U.S. 218, 225 (1973). This is done by assessing the "totality of the characteristics of the accused and the details of the interrogation." *Id*., at 226. Characteristics that have been considered for voluntariness include the lack of any advice to the accused of his constitutional rights and repeated and prolonged questioning. *Id*.

For several reasons, Mr. Bashir's consent to perform the field sobriety tests was not voluntary. First, Officer Gowron did not tell Mr. Bashir that the test was voluntary, rather, he simply tells Mr. Bashir "I'd like to do some field

sobriety tests with you." *See* AXON_Body_2_Video_2018-01-01_0229, at 4:20. Second, Mr. Bashir was never informed of his right to silence or counsel. Third, Mr. Bashir was questioned at length by several officers. Fourth, Mr. Bashir was not free to leave, as he was informed of his outstanding warrants and was surrounded by several officers.

1.3. With the suppression of the PBT result and the FST results, the evidence at the time of arrest was not sufficient for probable cause, requiring the Court to dismiss count 1, Driving Under the Influence.

At the time of arrest, the evidence supporting inferences that Mr. Bashir committed the crime of DUI were the following: (1) admission of drinking two shots of Hennessey; (2) a faint odor of intoxicants; and (3) watery eyes. *See* GO # 2018-00000, Page 36 of 51. These are not enough to establish probable cause for the crime of DUI, especially when considering the other overwhelming evidence that supported the inference that Mr. Bashir did not commit the crime of DUI.

First, no one witnessed Mr. Bashir driving on that night and admissions to driving occurred after his arrest. To have probable cause to arrest for the crime of DUI, the officer must have had knowledge or reasonably trustworthy information that the defendant had been driving at the time of the arrest. Civilian witness, Kira Nerys, spoke with police. She was asked if she saw Mr. Bashir driving and she did not. *See* AXON_Body_2_Video_2018-01-01_0215-file 5, at 2:55. No officers saw Mr. Bashir driving. *See* AXON_Body_2_Video_2018-01-01_0214, at 11:00.

Second, there were many other facts that supported the inference that Mr. Bashir did not commit the crime of DUI. The car that police believed Mr.

Sample #2

Bashir drove, a Chrysler 300C, was: (1) parked when police arrived; and (2) registered to Jadzia Dax, the woman lying on the street. When police first saw Jadzia Dax lying on the street, she was next to the driver side of the car. And lastly, no car key was recovered on Mr. Bashir.

Even without the suppression of the field sobriety tests, there would still not be enough facts to rise to probable cause because Mr. Bashir's performed well on the field sobriety tests. When he administered the HGN test, Officer Gowron did not see any nystagmus prior to 45 degrees and only saw nystagmus at maximum deviation. *See* GO # 2018-00000, Page 36 of 51. When discussing the HGN results with another officer, Officer Gowron said, "[Mr. Bashir's] eyes were pretty good." *See* AXON_Body_2_Video_2018-01-01_0229, at 13:55. With the walk and turn test, other than doing the turn incorrectly by pivoting on his toes, doing ten steps instead of nine, and missing heel to toe on one step, Mr. Bashir completed the test. *See* GO # 2018-00000, Page 36 of 51. Mr. Bashir informed Officer Gowron of a physical issue he had with his feet, which could affect the reliability of the walk and turn test's results. *Id*; and *see* AXON_Body_2_Video_2018-01-01_0229, at 8:15. When discussing the walk and turn results with another officer, Officer Gowron said, "[Mr. Bashir's] steps were not good," however, "[the steps] were the best [he'd] seen in a long time." *See* AXON_Body_2_Video_2018-01-01_0229, at 13:55. Because there was no probable cause for the crime of DUI at the time of arrest, the Court must dismiss count 1.

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2. The Court must dismiss counts 1, Driving Under the Influence, and 2, False Reporting, because the Prosecution will be unable to meet their burden of production with the suppression of unlawfully gathered statements.

An individual is considered in "custody" for purposes of *Miranda* when their liberty of action is deprived in any significant way. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). An individual is considered "interrogated" for the purposes of *Miranda* when state agents use any words or actions that the agent "should know are reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 292 (1980). If an individual will be subjected to "custodial interrogation," they must be given the *Miranda* warnings from the outset. *Miranda*, 384 U.S. at 467.

2.1. Mr. Bashir was in "custody" for purposes of *Miranda* when questioned about his name.

When police arrive at the scene, they immediately moved Mr. Bashir from where he was originally located. Mr. Bashir was surrounded by seven officers. At some point, Mr. Bashir was told he had a warrant. *See* AXON_Body_2_Video_2018-01-01_0214, at 8:50. Another officer tells Mr. Bashir "[he will] stay here all night to process him." *See* AXON_Body_2_Video_2018-01-01_0215-file 2, at 9:29. Mr. Bashir was clearly not free to leave and was seized; Mr. Bashir was in "custody" for the purposes of *Miranda*.

Sample #2

2.2. Mr. Bashir was "interrogated" for purposes of *Miranda* when questioned about his name.

After depriving Mr. Bashir of a significant amount of his liberty of action, Officer Kahless yelled at Mr. Bashir, telling Mr. Bashir that he knows Mr. Bashir is lying about his name. See AXON_Body_2_Video_2018-01-01_0214, at 8:49. Officer Kahless continued to ask Mr. Bashir what his real name was, and it is at this point where Mr. Bashir is subject to "interrogation" for the purposes of *Miranda*. Officer Kahless knew "[Mr. Bashir] [was] lying," and asked him what his real name was. Officer Kahless knew that the following answer would likely incriminate Mr. Bashir with regards to the crime of False Reporting.

2.3. Mr. Bashir was never given his *Miranda* warnings at the outset of his "custodial interrogation."

If Mr. Bashir was informed of his right to silence or an attorney, the investigation may have stopped. Because he was not informed those rights, it prolonged his interrogation, allowing officers to unlawfully obtain evidence. Defense requests that all statements and evidence derived from that unlawful custodial interrogation be suppressed, starting from the point where Officer Kahless yelled at Mr. Bashir, stating that he knew that Mr. Bashir was lying. This would include statements, observations, consent to perform the FST and PBT, and consent to blow into the DataMaster.

2.4. With the suppression of unlawfully gathered statements, the Prosecution can no longer meet their burden of production,

Sample #2

requiring the Court to dismiss counts 1, Driving Under the Influence, and 2, False Reporting.

Applicant Details

First Name	**Adam**
Last Name	**Silow**
Citizenship Status	**U. S. Citizen**
Email Address	**als384@georgetown.edu**
Address	**Address** **Street** **160 Bleecker St, Apt 9BE** **City** **New York** **State/Territory** **New York** **Zip** **10012** **Country** **United States**
Contact Phone Number	**7073383767**

Applicant Education

BA/BS From	**Arizona State University**
Date of BA/BS	**May 2016**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 22, 2022**
LLM From	**Georgetown University Law Center**
Date of LLM	**May 22, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of National Security Law and Policy**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Adam Silow
160 Bleecker Street, Apt. 9BE
New York, NY 10012
June 5, 2023

The Honorable Kiyo A. Matsumoto
United States District Court for the Eastern District of New York
225 Cadman Plaza East,
Brooklyn, NY 11201

Dear Judge Matsumoto:

I am an associate at Freshfields Bruckhaus Deringer US LLP, a graduate of Georgetown University Law Center, and a former student editor-in-chief of the *Journal of National Security Law & Policy*. I am writing to apply for a clerkship in your chambers for the 2025-2026 term or any other available term.

Public service in Brooklyn has long been a dream of mine because Borough Park provided my father's family with a new home after they fled Russian pogroms and passed through Ellis Island in the early 1900s. I applied to law school to become the first lawyer in my family and carry on the valuable lessons I learned first-hand in legal systems around the world in Germany, the Democratic Republic of Congo, and here in the United States.

I believe I can draw on these experiences, my work in law school, and my time as a practicing litigator to make a valuable contribution to your chambers. Since graduating law school in May of 2022, I moved to New York and applied my coursework, journal experience, and internships at the U.S. Attorney's Office for the Eastern District of New York and the U.S. Senate Foreign Relations Committee to my practice at Freshfields. I focused my practice on cross-border litigation and investigations, including, for example, pro bono work representing a class of over 10,000 Afghan and Iraqi Special Immigrant Visa applicants in a class action suit against the federal government that included second chairing depositions in my first six months and preparing an appeal before the D.C. Circuit. As a litigator, I aim to craft a long-term public service career in national security, fostering efficiency, accountability, and dispute resolution among public and private actors alike.

I have enclosed my resume, references, law transcript, and writing sample. Letters of recommendation will arrive separately for the supervisor and professors listed on the following references page.

I am more than happy to provide any additional information. You can reach me at 707-338-3767 or adam.silow@freshfields.com. Thank you for your consideration.

Very respectfully,

Adam Silow

List of References

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EDUCATION

GEORGETOWN UNIVERSITY **Washington, DC**

***Juris Doctor*, Georgetown University Law Center** (GPA 3.53) May 2022

Awards: Global Law Scholar

Journal: Student Editor-in-Chief, Vol. 12, *Journal of National Security Law & Policy*

Publication: "Bubbles over Barriers: Amending the Foreign Sovereign Immunities Act for Cyber Accountability," 12 J. NAT'L SEC. L. & POL'Y 659 (2022)

***Master of Science in Foreign Service*, Walsh School of Foreign Service** (GPA 3.91, distinction, top 20%) May 2022

Concentration: Global Politics & Security

BARRETT, THE HONORS COLLEGE AT ARIZONA STATE UNIVERSITY **Phoenix, AZ**

Bachelor of Science in Economics* and *Bachelor of Arts in Global Studies (GPA: 4.00, summa cum laude) May 2016

Leadership: Founder & Editor-in-Chief, Global Affairs Theoretical & Empirical Journal; President, Model UN Club

Awards: Phi Beta Kappa Member, New American University Presidential Scholar, Barrett Scholar

Honors Thesis: "Between War & Peace: Why Some Congo Narratives Evolve & Others Remain Entrenched" (2016)

EXPERIENCE

FRESHFIELDS BRUCKHAUS DERINGER US LLP **New York, NY**

***Associate*, Dispute Resolution Group** May – August 2021 (Summer Associate), September 2022 – Present

- *Litigation*: Second chairing depositions, managing document review, and conducting legal research for a pro bono class action against the federal government on behalf of over 10,000 Special Immigrant Visa applicants in *Afghan and Iraqi Allies v. Blinken*, including through discovery and an ongoing D.C. Circuit appeal; Drafted a pro bono appeal filed in state court on behalf of a domestic violence survivor; Drafted a pro bono parole hearing letter; Researched and drafted an amicus brief on foreign sovereign immunity before the Second Circuit.
- *Investigations*: Conducting legal research and document review for white-collar investigations spanning Europe and Asia.
- *Cybersecurity and data privacy*: Investigating data breaches and drafting breach notifications for global companies responding to U.S., U.K., and E.U. regulators; Providing pre-litigation support for a large U.S. tech company in Germany.
- *Sanctions and export controls*: Conducting legal research and writing on U.S. sanctions and export controls for U.S. and foreign clients in the aviation, telecommunications, pharmaceutical, and financial sectors.

Member: Halo (LGBTQ+ employee group)

Publications: Blogs on sanctions, cyber, and foreign sovereign immunity (https://blog.freshfields.us/u/102i1s8/adam-silow)

UNITED STATES SENATE FOREIGN RELATIONS COMMITTEE **Washington, DC**

***Law Intern*, Democratic Staff** January – August 2020

- Conducted legal research and writing on constitutional law, use of force, treaties, cyberattacks, foreign sovereign immunity, and emergency powers; Assisted with oversight investigations, including the first impeachment of President Trump.

UNITED STATES ATTORNEY'S OFFICE FOR THE EASTERN DISTRICT OF NEW YORK **Brooklyn, NY**

***Law Intern*, General Crimes Section** May – August 2019

- Argued two arraignments in court; Conducted legal research and writing on federal criminal jurisdiction, ethics, and evidence; Drafted indictments, analyzed call records and cell site location information, and edited warrants for active investigations.

FEMPO.NET **Goma, Democratic Republic of Congo**

International Operations Manager February – June 2018

- Led strategic planning, communication, and recruitment for Fempo, a start-up NGO supporting women political candidates.

NEW YORK UNIVERSITY IN BERLIN **Berlin, Germany**

Resident Assistant October 2016 – December 2017

- Implemented orientation of over 100 students in an international program and managed emergency situations and protocols.

OTHER

Bar Admission: New York State Bar (May 2023)

Language Skills: German (fluent, dual US-German citizenship); French (basic)

Personal Interests: Cooking my Bavarian Oma's schnitzel & spätzle, reading fantasy novels, and swinging kettlebells

Record of: Adam L Silow
GUID: 843107780

Course Level: Juris Doctor

Degrees Awarded:
Master of Science May 21, 2022
Graduate School
Major: Foreign Service
Juris Doctor Jun 08, 2022
Georgetown University Law Center
Major: Law/Foreign Service
Major: Law/Global Law Scholars

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law/Global Law Scholars

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2018							
LAWJ	001	92	Civil Procedure David Hyman	4.00	B+	13.32	
LAWJ	002	92	Contracts Girardeau Spann	4.00	B	12.00	
LAWJ	005	21	Legal Practice: Writing and Analysis Julia Ross	2.00	IP	0.00	
LAWJ	008	21	Torts Paul Rothstein	4.00	B	12.00	

	EHrs	QHrs	QPts	GPA
Current	12.00	12.00	37.32	3.11
Cumulative	12.00	12.00	37.32	3.11

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2019							
LAWJ	003	21	Criminal Justice Michael Gottesman	4.00	B	12.00	
LAWJ	004	92	Con Law I: Federal System Martin Lederman	3.00	B+	9.99	
LAWJ	005	21	Legal Practice: Writing and Analysis Julia Ross	4.00	B	12.00	
LAWJ	007	92	Property Madhavi Sunder	4.00	B+	13.32	
LAWJ	235	50	International Law I: Introduction to International Law David Koplow	3.00	A-	11.01	
LAWJ	611	03	Internal Investigation Simulation: Evaluating Corporate Corruption Michael Cedrone	1.00	P	0.00	

	EHrs	QHrs	QPts	GPA
Current	19.00	18.00	58.32	3.24
Annual	31.00	30.00	95.64	3.19
Cumulative	31.00	30.00	95.64	3.19

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	903	01	JD/MSFS Registration		NG		

	EHrs	QHrs	QPts	GPA
Current	0.00	0.00	0.00	0.00
Cumulative	31.00	30.00	95.64	3.19

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2020							
LAWJ	903	01	JD/MSFS Registration		NG		

----------Continued on Next Column----------

	EHrs	QHrs	QPts	GPA
Current	0.00	0.00	0.00	0.00
Annual	0.00	0.00	0.00	0.00
Cumulative	31.00	30.00	95.64	3.19

Program Changed to:
Georgetown University Law Center
Juris Doctor
Major: Law/Foreign Service
Major: Law/Global Law Scholars

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	014	05	Current Issues in Transnational (Private) Law Seminar David Stewart	3.00	A-	11.01	
LAWJ	1127	08	Cyber and National Security: Current Issues Seminar Mary DeRosa	2.00	A	8.00	
LAWJ	121	07	Corporations Charles Davidow	4.00	A-	14.68	
LAWJ	1493	05	Prison Law and Policy Shon Hopwood	3.00	A-	11.01	

	EHrs	QHrs	QPts	GPA
Current	12.00	12.00	44.70	3.73
Cumulative	43.00	42.00	140.34	3.34

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	165	09	Evidence Michael Pardo	4.00	B+	13.32	
LAWJ	260	08	Research Skills in International and Comparative Law Charles Bjork	2.00	A	8.00	
LAWJ	317	97	Negotiations Seminar Julie Linkins	3.00	A	12.00	
LAWJ	662	05	Global Law Scholars Seminar II: Building an International Skill Set David Stewart	1.00	P	0.00	
LAWJ	876	11	International Business Transactions Don De Amicis	3.00	A	12.00	

	EHrs	QHrs	QPts	GPA
Current	13.00	12.00	45.32	3.78
Annual	25.00	24.00	90.02	3.75
Cumulative	56.00	54.00	185.66	3.44

2019-2021

Transfer Credit:
Georgetown Sch of Forgn Serv
School Total: 9.00

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This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Adam L Silow
GUID: 843107780

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	1245	09	Trial Practice and Applied Evidence Craig Iscoe	3.00	A-	11.01	
LAWJ	1384	08	Computer Programming for Lawyers: An Introduction Paul Ohm	3.00	P	0.00	
LAWJ	215	08	Constitutional Law II: Individual Rights and Liberties Louis Seidman	4.00	A-	14.68	
LAWJ	361	03	Professional Responsibility Stuart Teicher	2.00	A-	7.34	
LAWJ	661	05	Global Law Scholars Seminar I: Building an International Skill Set David Stewart	1.00	P	0.00	

	EHrs	QHrs	QPts	GPA
Current	13.00	9.00	33.03	3.67
Cumulative	78.00	63.00	218.69	3.47

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	025	05	Administrative Law Anita Krishnakumar	3.00	A	12.00	
LAWJ	1151	08	National Security Lawyering Seminar Mary DeRosa	2.00	A	8.00	
LAWJ	1745	08	Foreign Intelligence Law Laura Donohue	3.00	A	12.00	

Dean's List 2021-2022

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	8.00	8.00	32.00	4.00
Annual	21.00	17.00	65.03	3.83
Cumulative	86.00	71.00	250.69	3.53

End of Juris Doctor Record

Record of: Adam L Silow
GUID: 843107780

Course Level: Juris Doctor

Degrees Awarded:
Master of Science May 21, 2022
Graduate School
Major: Foreign Service
Juris Doctor Jun 08, 2022
Georgetown University Law Center
Major: Law/Foreign Service
Major: Law/Global Law Scholars

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law/Global Law Scholars

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2018							
LAWJ	001	92	Civil Procedure David Hyman	4.00	B+	13.32	
LAWJ	002	92	Contracts Girardeau Spann	4.00	B	12.00	
LAWJ	005	21	Legal Practice: Writing and Analysis Julia Ross	2.00	IP	0.00	
LAWJ	008	21	Torts Paul Rothstein	4.00	B	12.00	

	EHrs	QHrs	QPts	GPA
Current	12.00	12.00	37.32	3.11
Cumulative	12.00	12.00	37.32	3.11

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2019							
LAWJ	003	21	Criminal Justice Michael Gottesman	4.00	B	12.00	
LAWJ	004	92	Con Law I: Federal System Martin Lederman	3.00	B+	9.99	
LAWJ	005	21	Legal Practice: Writing and Analysis Julia Ross	4.00	B	12.00	
LAWJ	007	92	Property Madhavi Sunder	4.00	B+	13.32	
LAWJ	235	50	International Law I: Introduction to International Law David Koplow	3.00	A-	11.01	
LAWJ	611	03	Internal Investigation Simulation: Evaluating Corporate Corruption Michael Cedrone	1.00	P	0.00	

	EHrs	QHrs	QPts	GPA
Current	19.00	18.00	58.32	3.24
Annual	31.00	30.00	95.64	3.19
Cumulative	31.00	30.00	95.64	3.19

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	903	01	JD/MSFS Registration		NG		

	EHrs	QHrs	QPts	GPA
Current	0.00	0.00	0.00	0.00
Cumulative	31.00	30.00	95.64	3.19

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2020							
LAWJ	903	01	JD/MSFS Registration		NG		

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	EHrs	QHrs	QPts	GPA
Current	0.00	0.00	0.00	0.00
Annual	0.00	0.00	0.00	0.00
Cumulative	31.00	30.00	95.64	3.19

Program Changed to:
Georgetown University Law Center
Juris Doctor
Major: Law/Foreign Service
Major: Law/Global Law Scholars

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	014	05	Current Issues in Transnational (Private) Law Seminar David Stewart	3.00	A-	11.01	
LAWJ	1127	08	Cyber and National Security: Current Issues Seminar Mary DeRosa	2.00	A	8.00	
LAWJ	121	07	Corporations Charles Davidow	4.00	A-	14.68	
LAWJ	1493	05	Prison Law and Policy Shon Hopwood	3.00	A-	11.01	

	EHrs	QHrs	QPts	GPA
Current	12.00	12.00	44.70	3.73
Cumulative	43.00	42.00	140.34	3.34

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	165	09	Evidence Michael Pardo	4.00	B+	13.32	
LAWJ	260	08	Research Skills in International and Comparative Law Charles Bjork	2.00	A	8.00	
LAWJ	317	97	Negotiations Seminar Julie Linkins	3.00	A	12.00	
LAWJ	662	05	Global Law Scholars Seminar II: Building an International Skill Set David Stewart	1.00	P	0.00	
LAWJ	876	11	International Business Transactions Don De Amicis	3.00	A	12.00	

	EHrs	QHrs	QPts	GPA
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Annual	25.00	24.00	90.02	3.75
Cumulative	56.00	54.00	185.66	3.44

2019-2021

Transfer Credit:
Georgetown Sch of Forgn Serv
School Total: 9.00

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Record of: Adam L Silow
GUID: 843107780

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	1245	09	Trial Practice and Applied Evidence Craig Iscoe	3.00	A-	11.01	
LAWJ	1384	08	Computer Programming for Lawyers: An Introduction Paul Ohm	3.00	P	0.00	
LAWJ	215	08	Constitutional Law II: Individual Rights and Liberties Louis Seidman	4.00	A-	14.68	
LAWJ	361	03	Professional Responsibility Stuart Teicher	2.00	A-	7.34	
LAWJ	661	05	Global Law Scholars Seminar I: Building an International Skill Set David Stewart	1.00	P	0.00	

	EHrs	QHrs	QPts	GPA
Current	13.00	9.00	33.03	3.67
Cumulative	78.00	63.00	218.69	3.47

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	025	05	Administrative Law Anita Krishnakumar	3.00	A	12.00	
LAWJ	1151	08	National Security Lawyering Seminar Mary DeRosa	2.00	A	8.00	
LAWJ	1745	08	Foreign Intelligence Law Laura Donohue	3.00	A	12.00	

Dean's List 2021-2022

Transcript Totals

	EHrs	QHrs	QPts	GPA
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Annual	21.00	17.00	65.03	3.83
Cumulative	86.00	71.00	250.69	3.53

End of Juris Doctor Record

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 05, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I understand Adam Silow has applied for a clerkship in your chambers. I know Adam well from his time in law school and we have kept in touch since. He is smart, creative, and a very good writer. I recommend him enthusiastically.

Adam was a student in two of my national security law seminars: Cyber and National Security in the fall of 2020 and National Security Lawyering in the spring of 2022. His work was consistently excellent and he received an A in both classes. Adam always chose to tackle complex issues with his papers. His writing is polished and compelling. More importantly, his ideas are always creative and sophisticated. Adam was also my most reliable contributor to class discussions and I was continually impressed by the breadth of his knowledge and thoughtful responses. I thoroughly enjoyed having him as a student.

I first got to know Adam from his participation in the Global Law Scholars (GLS) program, which I co-direct. GLS is a small, selective program designed for Georgetown law students interested in international or transnational issues. GLS participants must have a background that includes international experience and proficiency in a second language (Adam speaks German). The GLS students meet regularly in their first year for discussions on international and national security law, leadership, and negotiation skills. In their second year, the students work as a group on a major project on a transnational or international law issue of their choosing. It is a challenging experience that helps them develop both substantive knowledge and critical teamwork skills. Adam was an active and effective participant in the group. Adam and his class produced a timely, thorough, and well-written report on *Arctic Summer: Law and Policy Implications of a Melting Arctic*. The group followed up by organizing an event in which they invited experts to discuss key Arctic legal and policy issues. Adam's contributions to the written report and the event were excellent.

As you can see from Adam's resume, he has a strong interest in international law, national security, and foreign relations. In fact, he graduated from Georgetown with both a JD and a Master of Science in Foreign Service. Because of this interest and my background in national security and foreign policy, we have had many conversations over the years. Adam is a humble, warm, and fun person. He is simply a pleasure to be around.

I know you would find Adam to be an exceptional law clerk and a terrific addition to your chambers. Please let me know if I can provide any additional information.

Sincerely,

Mary B. DeRosa
Professor from Practice
mbd58@georgetown.edu
202-841-2415

New York

601 Lexington Avenue, 31st Floor
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freshfields.us

June 5, 2023

Doc ID - Document1/0
Our Ref - DYL

Dear Judge:

I write in support of Adam Silow's clerkship application. I have worked with Adam since he joined Freshfields as a summer associate in 2021. Both as a summer associate and since returning to the firm full-time last year, Adam has proven himself to be an excellent associate with strong research and analytical skills. I feel confident that he would be an asset to your chambers.

I work with Adam on our firm's largest pro bono matter, where Freshfields (along with our pro bono partner, the International Refugee Assistance Project) represents a class of Afghan and Iraqi individuals who find themselves in danger as a result of their work for the U.S. government, and who have therefore applied for special immigration visas to the United States. This class sued the Department of State and the Department of Homeland Security to challenge systemic delays in the processing of their visa applications.

Adam joined the case in December, just as we entered a busy three-month discovery period, which involved twelve depositions, document review, and significant briefing. Adam jumped into each of these tasks with enthusiasm. He helped draft our written submissions and deposition outlines, demonstrating precise factual and legal research, and volunteered to manage the document review. Despite having never participated in a document review, Adam was eager to learn the process, which he ultimately managed with attention to detail and efficiency. Adam always has a long to-do list on this case—in great part because he regularly volunteers to take on more work, even when his billable work is busy—and he stays many steps ahead, making sure to send regular reminders and follow-ups to his managers on time-sensitive tasks. Adam's work on this matter has been so impressive that, as a first-year associate, he second-chaired several depositions, an opportunity usually given to much more senior associates.

Individual assignments aside, I have been constantly impressed by Adam's strategic thinking and grasp of new concepts. This case has a long, winding history that began in 2018, and yet Adam quickly understood the importance of various procedural and substantive elements of the case, and his work demonstrates that

he thinks critically about each stage. I imagine this skill will be useful as a clerk, where clerks are asked to take over ongoing cases in a transition period.

Aside from the IRAP matter, I have also worked with Adam in defending one of the many Madoff-related clawback actions brought by the Madoff trustee, Irving Picard. The case raises a number of thorny procedural and substantive issues, and Adam was asked to research a complex question concerning imputation of knowledge and the faithless agent doctrine under New York law. Adam's research was detailed, thorough, and his analysis very crisp. Adam's research underpins our litigation strategy, demonstrating a skill beyond his level of seniority at the firm.

During his time at Freshfields, Adam has sought out and received extensive writing experience, working on a number of amicus briefs in addition to his regular docket. For example, he is a member of a team that is drafting an amicus brief to be submitted on behalf of several former government officials to the Second Circuit Court of Appeals arguing that the Terrorism Risk Insurance Act allows attachment of foreign central bank assets. Adam took the lead in researching and drafting critical sections of that brief. Similarly, Adam recently drafted the statement of facts in a petition challenging an administrative decision of the New York Office of Children and Family Services filed in New York state court under great time pressure. Within a day and a half, Adam had carefully reviewed the complicated administrative record, identified the facts relevant to the legal arguments and equities, and woven the facts into a clear, well-structured, and compelling narrative. As a result of his hard work and strong legal skills, Adam has earned a reputation as one of our stronger associates—as someone who can be entrusted with significant projects with confidence that he will carefully consider the issues and prepare strong written work product in an efficient and timely manner.

Finally, Adam's work—while excellent—is outshined by his demeanor. He is kind, inquisitive, and an overall team player. He makes sure that his colleagues are adequately supported even if that means taking on extra work that cuts into his own free time. I am confident that he would contribute similarly in a small chambers community.

If there is any further information that I can provide you with in support of Adam's application, please do not hesitate to ask.

Very truly yours,

David Y. Livshiz
Partner
Freshfields Bruckhaus Deringer US LLP

Freshfields

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 05, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing in strong support of Mr. Adam Silow, who is applying for a clerkship in your chambers. I first got to know Adam when I taught him in Foreign Intelligence Law in Spring 2022. He was a terrific student and regularly contributed to the discussion in ways that advanced the conversation. He performed exceedingly well on the final, earning one of the highest scores in the class and an A in the course overall. Most remarkably, he managed to perform at this high level all while serving as Editor-in-Chief of the law school's *Journal of National Security Law and Policy*, and completing his master's degree in Foreign Service at Georgetown – graduating from the Walsh School of Foreign Service with a 3.91 GPA. He would bring a tremendous amount of talent – and dedication – to your chambers.

Adam has a great love to constitutional law and is particularly interested in the tension between federal power and individual rights. A common thread throughout his law school career has been exploring the nexus through courses like Constitutional Law I and II, Foreign Intelligence Law, Administrative Law, and Prison Law. He has a deep grasp of the importance of separation of powers for democratic governance, having seen places where such boundaries have failed. He worked, for instance, in the DR Congo, where he witnessed the violence and corruption that proliferates in a system with a weak commitment to rule of law. He recognizes that the U.S. system is far from perfect, which is part of why he is so interested in clerking: he will have the opportunity to learn from judges, who are in critical positions to balance interbranch conflicts and to protect individual rights.

Adam's future is in public service. He has enjoyed working at an international law firm and, after paying off his law school and graduate school tuition over the next few years, he plans to bring that experience to working in national security law in the federal government. For him, the national security space provides a critical window into challenging questions related to separation of powers, privacy and cyber innovation, complex sanctions, and moral and legal questions on the use of force. Clerking would help to provide an invaluable mentorship and substantive legal research and writing skills for him to carry into his public service career.

Adam also seeks clerking as an opportunity to gain a unique vantage point. Typically, litigators spend their entire careers in court representing a party on one side of a case and zealously arguing for their client's interests. While he enjoys this work at the firm, he would welcome the opportunity to step back to weigh not just the advocates and arguments on different sides of a case. Beyond the substance of the law (which itself is often complex and can be challenging to understand fully), there is an immense amount of unwritten practice that guides the small and big decisions that judges make daily. Adam is the first in his family to ever go to law school and to become an attorney. He is excited to learn more about how the law is argued, judged, and written.

It is often difficult to tell from a transcript who an individual is as a person. Adam's identity is divided among many different groups, cultures, and places. He is an only child but has a large extended family. He holds dual citizenship with the United States and Germany. His father, who is Jewish, is from Brooklyn, while his mother, who is Catholic, was born in Bavaria. He has lived across the United States (New Mexico, California, Arizona, Ohio, Washington, D.C., and New York), as well as in many countries (such as Ghana, DR Congo, and Germany), and he has travelled widely.

Through his peripatetic upbringing and hyphenated identities, Adam has adapted and come to embrace being outside his comfort zone and pushing his limits. Whether it is sky- or scuba-diving, learning to box from a Serbian coach in Berlin, figuring out how to get past Congolese border guards without paying a bribe, or balancing law and masters classes with his sanity intact, he loves taking on new challenges he never thought he could do. It is not because he knows he'll succeed – he, himself, will admit that he often hasn't—at least at first (!). But he does it because, for him, life is too short to stay in one box and to limit what there is to learn about the world.

Adam would be a tremendous asset to your chambers. He brings intelligence, thoughtfulness, hard work, experience, and a willingness to delve into the most difficult questions. I recommend him without reservation.

Please feel free to reach out to me at 202 531 4433 if I can provide any additional information.

Yours sincerely,

Professor Laura K. Donohue, J.D., Ph.D. (Cantab.)
Scott K. Ginsburg Professor of Law and National Security
Professor of Law

Laura Donohue - lkdonohue@law.georgetown.edu

Upper-Level Writing Requirement Final Paper

The following is an excerpt from a paper submitted on March 15, 2020 without external editing for Professor David Stewart's class on "Current Issues in Transnational (Private International) Law." This paper addresses state-sponsored cyber attacks and the Foreign Sovereign Immunities Act, specifically whether the FSIA provides an avenue of redress for victims of cyber attacks. These excerpted pages cover pertinent legal research and analysis that reviews other proposals to amend the FSIA and then presents its own solution.

The full paper, which was published subsequently with revisions, can be found at: Adam L. Silow, "Bubbles over Barriers: Amending the Foreign Sovereign Immunities Act for Cyber Accountability," 12 J. NAT'L SEC. L. & POL'Y 659 (2022), available at https://jnslp.com/wp-content/uploads/2022/06/Silow_Amending_the_Foreign_Sovereign_Immunities_Act_for_Cyber_Accountability.pdf.

[Excerpted passages]

A. Private suits are blocked by the current FSIA

Compared to government responses, such as prosecutions and offensive cyber, private responses directly by victims have seen even less success because of direct restrictions under the FSIA. The issue of private cybersecurity contractors adds another complicating factor to the question of liability. The FSIA does not provide a clear answer on whether private contractors receive derivative foreign sovereign immunity based on their government clients. Contractors providing legitimate services for intelligence, defense, and law enforcement activities are left uncertain about the potential liability they might face. Furthermore, the FSIA was passed before the modern digital era and does not properly account for contemporary cyber threats. Even the more recently passed exceptions do not account for cyberattacks.

1. Ambiguous derivative immunity creates uncertainty and liability risks for contractors

Returning to the ongoing litigation between WhatsApp and NSO in the Northern District of California—concerning foreign governments using NSO's Pegasus spyware to hack WhatsApp users—discovery stalled over the issue of derivative foreign sovereign immunity.[1] NSO filed a motion to dismiss WhatsApp's complaint, arguing in part, that the District Court lacked subject matter jurisdiction because NSO enjoyed derivative foreign sovereign immunity based on its alleged foreign sovereign clients. NSO argued for immunity because it believed—accurately so (as outlined in the next section)—that none of the current FSIA exceptions apply to

[1] The closest any of the direct victims have come to challenging NSO Group is a lawsuit by Amnesty International (AI) against NSO Group in Israel to have the company's export license revoked for monitoring human rights activists, including one of AI's researchers. The Tel Aviv District Court Judge dismissed the lawsuit for failure to "substantiate" the claim, finding the Israeli Defense Ministry's "thorough and meticulous" process for granting export licenses was sufficiently sensitive to human rights violations. Oliver Holmes, *Israeli Court Dismisses Amnesty Bid to Block Spyware Firm NSO*, GUARDIAN (July 13, 2020), https://www.theguardian.com/world/2020/jul/13/israeli-court-dismisses-amnesty-bid-to-block-spyware-firm-nso.

NSO's conduct, meaning WhatsApp, and other injured parties, would not have a viable claim for relief against NSO.

The FSIA does not explicitly provide derivative immunity for contractors. Consequently, the question has been left to judicial interpretation. The Ninth Circuit has not previously adopted a rule regarding derivative foreign sovereign immunity, but NSO argued that the District Court in Northern California should adopt the rule outlined by the Fourth Circuit in *Butters v. Vance*.[2] The Fourth Circuit upheld derivative foreign sovereign immunity when an employee of a U.S. security company hired by Saudi Arabia sued the company for gender discrimination. The Fourth Circuit drew its conclusion from the rule that U.S. domestic contractors receive the privilege of derivative immunity when contracting for the United States government; the Fourth Circuit held that it is "but a small step to extend this privilege to the private agents of foreign sovereigns."[3]

The Northern California District Court, though, found NSO was asking for a larger step than it conceded. On July 16, 2020, Chief District Court Judge Phyllis J. Hamilton denied NSO's motion to dismiss and rejected the adoption of derivative foreign sovereign immunity.[4] Judge Hamilton emphasized that the Ninth Circuit has not adopted the derivative rule from *Butters*, and even if it had, NSO would not satisfy the standard because it is incorporated outside the United States.[5] Judge Hamilton also objected to the Fourth Circuit's reasoning, arguing "there are different rationales underlying domestic and foreign sovereign immunity."[6] *Domestic* sovereign immunity is grounded in exercising valid constitutional authority from the U.S. federal government. *Foreign* sovereign immunity, on the other hand, is "a matter of grace and comity on the part of the United States," wrote Judge Hamilton.[7] Judge Hamilton did not imply derivative foreign sovereign immunity is unconstitutional, or even unwise as a policy matter. Rather, her reasoning suggests the doctrine of derivative foreign sovereign immunity is for the legislative and executive branches to resolve, not the judiciary.

There is an additional reason why derivative immunity is best left to the other branches—customary international law ("CIL"). Judge Hamilton slightly overstated the important of grace and comity in outlining the basis of foreign sovereign immunity. Scholar David Stewart writes that grace and comity, despite frequent reference, "are nowhere to be found" in Chief Justice John Marshall's "seminal" opinion in *The Schooner Exchange*, which first recognized foreign sovereign immunity.[8] Instead, Marshall's opinion "refers to the usage and principles adopted by

[2] 225 F.3d 462, 466 (4th Cir. 2000).
[3] *Id.*
[4] Although it is beyond the scope of this paper, the District Court's approximately seventy-four-page order covers a host of fascinating, complex cyber issues, including how personal jurisdiction is analyzed under the tests of purposeful direction and purposeful availment for foreign defendants alleged to have hacked into the forum state. WhatsApp Inc. v. NSO Grp. Techs. Ltd., 472 F.Supp.3d 649 (N.D. Cal. July 16, 2020) (finding that the court had subject matter jurisdiction and personal jurisdiction, while granting the motion to dismiss WhatsApp's fourth cause of action for trespass to chattels because WhatsApp failed to allege actual damage to infected servers).
[5] *Id.* at 667 ("In Butters, the defendant asserting derivative sovereign immunity was a U.S. corporation and the Fourth Circuit's reasoning indicated that the U.S. citizenship of the company was necessary to its holding.").
[6] *Id.* (citing Broidy Cap. Mgmt. L.L.C. v. Muzin, No. 19-CV-0150 (DLF), 2020 WL 1536350, at *7 (D.D.C. Mar. 31, 2020) (denying derivative foreign sovereign immunity to defendant companies working for Qatar, who were sued for hacking into the plaintiff's computers in response to his criticism of Qatar)).
[7] *Id.* (quoting Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983).
[8] STEWART, *supra* note 27, at 6; *see also* Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136–37 (1812).

the unanimous consent of nations—what today we refer to as customary international law."[9] CIL is created by opinio juris—a sense of legal obligation—and state practice—requiring the custom be widespread, longstanding, and generally accepted by other states.

Congress and the President are the primary drivers of U.S. state practice as part of CIL. Under the U.S. Constitution, the executive and legislative branches are given primacy over the judicial branch in foreign affairs. The President, under Article II, is commander-in-chief of the armed services and has the power to conduct diplomacy.[10] Under Article I, Congress is given the foreign commerce power and authority to create and maintain the military, declare war, and "define and punish piracies and felonies committed on the high seas, and *offenses against the law of nations*" (emphasis added).[11] Although foreign sovereign immunity is entrenched in CIL, derivative immunity is not. Congress should pass, and the President should sign, derivative foreign sovereign immunity into law. Doing so would not only produce good policy in an otherwise murky area, but it would also begin a new state practice that could eventually crystalize into CIL.

Derivative foreign sovereign immunity would create certainty because cybersecurity companies contracting with states are currently operating in a gray area of liability. For most contractor industries—such as construction or physical security—immunity in foreign courts will not be an issue as they only need to worry about legal liability from the domestic jurisdiction in which they contract in. Contractors in the cybersecurity industry, however, are at a higher risk of complex, foreign litigation because they provide services and products which can cause substantial effects and harm across borders. Cybersecurity contractors' cross-border activities affect a broader pool of potential foreign plaintiffs and raise complicated conflict of laws questions regarding jurisdiction, choice of law, and judgment-recognition. It is in the United States' interest to clarify its position through domestic legislation and further a new international custom of derivative foreign sovereign immunity to create legal certainty for U.S. and foreign cybersecurity contractors.

Leaving the question of derivative immunity to the courts will not solve the problem. If U.S. contractors are sued outside the Fourth Circuit, it is unlikely they would receive immunity. The derivative immunity question in the WhatsApp lawsuit is now on appeal before the Ninth Circuit. If the Ninth Circuit rejects derivative foreign sovereign immunity, cybersecurity companies supporting legitimate state functions of law enforcement and national security will be exposed to litigation risks, even though their government partners will enjoy immunity. On the other hand, if the Ninth Circuit extends NSO derivative immunity, it is likely NSO will escape liability for its actions because none of the FSIA's current exceptions will apply.

2. Current FSIA exceptions do not apply to cyberattacks

The FSIA provides nine distinct exceptions for which states may be held liable.[12] Assuming immunity is not waived by a state, three other exceptions—commercial activity,

[9] STEWART, *supra* note 27, at 6.
[10] U.S. CONST. art. II, § 2, cl. 1-2.
[11] U.S. CONST. art. I, § 8, cl. 3, 10-15. More broadly, Congress can influence U.S. foreign affairs through its power of the purse and the necessary and proper clause. U.S. CONST. art. I, § 9, cl. 7; *id.* art. I, § 8, cl. 18.
[12] *See generally* STEWART, *supra* note 27, at 47-136 (outlining the scope and elements of all nine exceptions, which include waiver, commercial activity, expropriations, rights in certain kinds of property in the United States,

tortious conduct, and terrorism—are potentially relevant in the context of cyberspace. None, however, provide injured parties with an effective avenue of accountability—whether declarative, injunctive, or compensatory relief—in U.S. courts against hacking states.

The most litigated FSIA exception is for commercial activity.[13] The commercial activity exception strips sovereign immunity for a state conducting commercial activities as a private individual or company would in business.[14] The statute defines commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act."[15] In addition, the FSIA emphasizes commercial activity is determined by its nature, not its purpose.[16] Thus, commercial activity is not based on a profit motive, but "whether the government's particular actions (whatever the motive behind them) are the *type* of actions by which a private party engages in commerce."[17] The Ninth Circuit recently concluded that "a foreign government's conduct of clandestine surveillance and espionage against a national of another nation in that other nation is not 'one in which commercial actors typically engage.'"[18] Cyberattacks against human rights activists—individuals with no clear business connection—are also unlikely to constitute commercial activity.

In a recent article, Jerry Goldman and Bruce Strong argue that the commercial activity exception covers hacking trade secrets based on a D.C. District Court decision in *Azima v. RAK Investment Authority*.[19] In that case, the District Court found that a UAE state investment entity's hacking of a businessman constituted commercial activity under the FSIA.[20] The District Court focused on the overlap in timing, emphasizing that the UAE entity hacked the businessman as mediation began between both parties.[21] Based on the *Azima* Court's reasoning, Goldman and Strong argued that "steal[ing] trade secrets for the purpose of giving their own companies a competitive commercial advantage" would "neatly fall under the commercial activity exception."[22] Not so. Hacking during mediations is different from cyber economic espionage.

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noncommercial torts, enforcement of arbitral agreements and awards, state-sponsored terrorism, maritime liens and preferred mortgages, and counterclaims); *see also* 28 U.S.C. §§ 1605(a)(1)-(6), 16-5(A), 1605(b)-(d), 1607.

[13] STEWART, *supra* note 27, at 50-51.

[14] 28 U.S.C. § 1605(a)(2).

[15] 28 U.S.C. § 1603(d).

[16] *Id.*

[17] Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 607 (1992) (finding Argentina's issuance of bonds with repayment in U.S. dollars in several markets, including New York, was a commercial activity with a "direct effect in the United States" under the FSIA).

[18] Broidy Cap. Mgmt., L.L.C. v. Qatar, 982 F.3d 582, 594 (9th Cir. 2020); *see also* Democratic Nat'l Comm. v. Russian Federation, 392 F.Supp.3d 410, 429 (S.D.N.Y. 2019) (finding that Russia's hacks against the Democratic National Committee in 2015 did not constitute commercial activity because "transnational cyberattacks are not the 'type of actions by which a private party engages in trade and traffic or commerce'").

[19] Jerry Goldman & Bruce Strong, *Overcoming Immunity of Foreign Gov't Cyberattack Sponsors*, LAW360 (Dec. 2, 2020 5:07 PM), https://www.law360.com/cybersecurity-privacy/articles/1332591/overcoming-immunity-of-foreign-gov-t-cyberattack-sponsors?nl_pk=7733056d-73e1-469d-a74f-7a8f7677c91c&utm_source=newsletter&utm_medium=email&utm_campaign=cybersecurity-privacy.

[20] Azima v. RAK Inv. Auth., 305 F.Supp.3d 149 (D.D.C. Mar. 30, 2018), *rev'd*, 926 F.3d 870 (D.C. Cir. 2019) (reversing the District Court on separate grounds because a forum selection clause established England as the proper venue).

[21] AZIMA 166 ("Azima starts off noting that the hacking of his computer began in October of 2015 and continued through the summer of 2016—a time period that roughly corresponds with the time in which Azima served as a mediator between RAKIA and its former CEO.")

[22] Goldman & Strong, *supra* note 59.

Unlike the facts in *Azima*, hacks of trade secrets are unlikely to occur simultaneous with a commercial activity. A company receiving the stolen trade secrets will be unable to take commercial advantage of the information likely until long after the actual hack is complete. Establishing the causal link without an easy temporal inference will require significantly more evidence and resources. The District Court's reliance in *Azima* on a close-in-time overlap in activity means plaintiffs will struggle to bring cases involving cyber economic espionage that link hacks with ongoing commercial activity.

The FSIA also includes a noncommercial tort exception, which provides that states are not granted immunity for cases:

> in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, *occurring in the United States* and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment (emphasis added).[23]

In 2015, one author envisaged the FSIA's tort exception as a possible path for holding state-sponsors of cyberattacks accountable.[24] The author pointed to two cases—*Letelier v. Republic of Chile*, and *Liu v. Republic of China*—in which assassinations by foreign agents in the United States satisfied the tort exception.[25] Nonetheless, the D.C. Circuit refused to apply the tort exception in the context of a cyberattack by Ethiopia against a human rights activist in Maryland.[26] The D.C. Circuit distinguished the foreign cyberattack from the assassination cases by emphasizing the tort exception's situs requirement, which provides that the entire tort must occur in the United States. Although the assassins in *Letelier* and *Liu* were foreign agents, their tortious conduct occurred in the United States—the Taiwanese agent shot a man California, and the Chilean agents "constructed, planted and detonated a car bomb in Washington, D.C."[27] While there may be an argument that the assassination planning occurred abroad, the D.C. Circuit emphasized that the injury caused by Ethiopia's cyberattack included not only an "intent to spy" from abroad but also an "initial dispatch" of malware in Ethiopia, meaning "integral aspects of the final tort…lay solely abroad."[28] States rely on cyberattacks precisely because of the ability to affect targets in a different location from where the attack is launched. Cyberspace provides a means of covertly reaching across borders and harming entities or states that are otherwise inaccessible. Therefore, most cyberattacks are likely to run afoul of the tort exception's situs requirement.

Congress has amended the FSIA several times related to terrorism. In 1996, Congress added an exception for state-sponsored terrorism, removing immunity for certain acts of terrorism, such as torture, extrajudicial killing, aircraft sabotage, hostage taking, or material support.[29] An important provision in the new exception provided that immunity would only be removed for states formally designated by the U.S. Secretary of State as a sponsor of terrorism.

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[23] 28 U.S.C. § 1605(a)(5).
[24] Scott A. Gilmore, *Suing the Surveillance States: The (Cyber) Tort Exception to the Foreign Sovereign Immunities Act*, 46 COLUM. HUM. RTS. L. REV. 223 (2015); Goldman & Strong, *supra* note 59.
[25] Letelier v. Republic of Chile, 488 F.Supp. 665 (D.D.C. 1980); Liu v. Republic of China, 892 F.2d 1419 (9th Cir. 1989).
[26] Doe v. Federal Democratic Republic of Ethiopia, 851 F.3d 7, 11 (D.C. Cir. 2017)
[27] *Id.*
[28] *Id.*
[29] Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 12241 (1996) (codified at 28 U.S.C. § 1605(a)(7)).

With the state sponsors of terrorism list, the executive branch acts as a gatekeeper, tightly limiting the number of countries who face liability. When the terrorism exception passed in 1996, only six states were on the list: Cuba, Iran, Libya, North Korea, Sudan, Syria, and Iraq. As of March 2021, only Cuba, North Korea, Iran, and Syria remain.[30]

Congress broadened the terrorism exception in 2008 under 28 U.S.C. § 1605A by removing the bar on punitive damages and creating a federal cause of action that could be applied retroactively.[31] In 2016, Congress passed—over the president's veto—an additional exception under § 1605B known as the Justice Against Sponsors of Terrorism Act (JASTA).[32] Frustrated by the executive branch's refusal to list certain countries, specifically Saudi Arabia, Congress passed JASTA to provide another legal avenue against perpetrating states, regardless of designation by the Secretary of State. JASTA also removed the entire tort requirement for acts of international terrorism that take place in the United States, as defined by the Antiterrorism Act (ATA).[33] Nonetheless, plaintiffs have not yet succeeded in bringing claims under JASTA. For example, the families of the 9/11 victims protested the removal of Sudan in December 2020 from the state sponsors of terrorism list because it would remove their ability to bring claims under § 1605A and they did not see JASTA as a viable path for their claims against Sudan.[34] Despite Congress' intentions, JASTA has not yet demonstrated that it is a suitable alternative to §1605A.

The FSIA's terrorism exceptions under either §1605A or §1605B (JASTA) were created to address a specific harm—violent terrorist acts—and, therefore, do not fit well for harms in cyberspace. Nonetheless, some authors argue otherwise.[35] Goldman and Strong acknowledge that the state sponsor exception "does not at first blush appear to apply to hacking," but continue on to provide examples they believe could apply.[36] They argue hacking an airplane or air traffic control could constitute aircraft sabotage, hacking a hospital causing patients to die without

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[30] *See* State Sponsors of Terrorism, U.S. DEP'T STATE, https://www.state.gov/state-sponsors-of-terrorism/#:~:text=Currently%20there%20are%20three%20countries,)%2C%20Iran%2C%20and%20Syria.&text=For%20more%20details%20about%20State,in%20Country%20Reports%20on%20Terrorism (last visited March 16, 2021).

[31] 28 U.S.C. § 1605A (including three other limitations: 1. a ten-year limitations period; 2. the claimant or victim was a U.S. national, member of the armed forces, or otherwise a U.S. employee or contractor; and 3. the claimant must first afford the "foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration").

[32] Pub. L. No. 114-222, 130 Stat. 852 (2016); *see* Rachael E. Hancock, *'Mob-Legislating': JASTA's Addition to the Terrorism Exception to Foreign Sovereign Immunity*, 103 CORNELL L. REV. 1293, 1294 (2018) ("On September 28, 2016, a politically divided United States Senate overrode President Barack Obama's veto for the first and only time in a particularly decisive vote: 97–1.").

[33] 18 U.S.C. § 2331 (defining international terrorism as activities involving: a) violent acts or acts dangerous to human life that b) appear to be intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by mass destruction, assassination, or kidnapping).

[34] Lara Jakes, *U.S. Prepares to Take Sudan Off List of States That Support Terrorism*, N.Y. TIMES (Sept. 24, 2000), https://www.nytimes.com/2020/09/24/us/politics/us-sudan-terrorism.html (The delisting of Sudan resolved Sudan's payments to victims of the 1998 East Africa Embassy bombings and the 2000 Cole bombing, but 9/11 families also believe they have viable claims against Sudan for supporting Al-Qaeda. The 9/11 victims' families "broadly objected to the immunity legislation before their own legal cases against Sudan are resolved.").

[35] *See, e.g.*, John J. Martin, *Hacks Dangerous to Human Life: Using JASTA to Overcome Foreign Sovereign Immunity in State-Sponsored Cyberattack Cases*, 121 COLUM. L. REV. (forthcoming Jan. 2021); Goldman & Strong, *supra* note 59 (arguing that both § 1605A and § 1605B apply).

[36] Goldman & Strong, *supra* note 59.

access to medical care might be extrajudicial killing, and hacking "infrastructure that traps people in a particular location" might be hostage-taking.[37] The authors provide no evidence that any of these hyper-specific examples are widespread phenomena or have ever occurred. For example, in September 2020, a ransomware attack on a German hospital was suspected as causing "the first known death from a cyberattack,"[38] but police later clarified the patient's poor health was the cause of death and "the delay [in medical care from the ransomware] was of no relevance to the final outcome."[39] While a cyberattack that causes physical damage to humans may constitute a violent terrorist act, such attacks make up few, if any, of the current wave of cyberattacks. In addition, plaintiffs relying on §1605A's state sponsors exception are currently only able to sue the four listed states—Cuba, Iran, North Korea, and Syria. Other state sponsors of malicious cyberactivity, notably Russia and China, face no liability under the state sponsors exception.

John Martin writes that cyberattacks fit under §1605B (JASTA), which relies on the substantive elements under the ATA, rather than the limited acts enumerated in §1605A's state sponsors exception. Martin argues the ATA's inclusion of "acts dangerous to human life" is broad enough to cover cyberattacks.[40] JASTA, according to Martin, could provide protection for political dissidents if, for example, "the act of distributing secret information after a data breach could endanger human life if it contains personal information about an individual that then subjects them to potential targeting and harassment."[41] Plaintiffs, however, would need to prove a complicated chain of causation connecting the state to the hack to the breached secret information to harassment that causes dangers to human life. Stealing trade secrets is even more attenuated to dangerous affects to human life. Even if human rights activists have a potentially viable path under JASTA, cyberattacks causing massive economic damage without endangering human lives would go unaddressed. Martin is also too quick to dismiss the argument that JASTA was intended "for one specific purpose: to allow [9/11] victims' families to sue Saudi Arabia."[42] And even the 9/11 families' claims, for which the statute was created, have not gone far under JASTA.[43] Judges will likely be wary to read into JASTA a new type of claim for cyberattacks that Congress did not specifically anticipate. Applying cyberattacks to these terrorism statutes is like fitting a square peg in a round hole. The state sponsors exception and JASTA were created to mitigate harm for physically destructive acts of terrorism. These exceptions were not drafted to capture the less tangible, but significant harms created by malicious states in cyberspace.

In summary, cyberattacks do not fit under the FSIA's current exceptions. The current status of the law for foreign sovereign immunity risks creating perverse outcomes for actors in cyberspace. Judge-made derivative foreign sovereign immunity without a new FSIA exception for cyberattacks will mean the worst of both worlds: no accountability for cyberattacks with blanket immunity afforded to both states *and* their cybersecurity contractors.

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[37] Goldman & Strong, *supra* note 59.
[38] Melissa Eddy & Nicole Perlroth, *Cyber Attack Suspected in German Woman's Death*, N.Y. TIMES (Sept. 18, 2020), https://www.nytimes.com/2020/09/18/world/europe/cyber-attack-germany-ransomeware-death.html.
[39] Patrick Howell O'Neill, *Ransomware Did Not Kill a German Hospital Patient*, MIT TECH. REV. (Nov. 12, 2020), https://www.technologyreview.com/2020/11/12/1012015/ransomware-did-not-kill-a-german-hospital-patient/.
[40] 18 U.S.C. § 2331(1)(A).
[41] Martin, *supra* note 75, at 38.
[42] Martin, *supra* note 75, at 45.
[43] *See In re* Terrorist Attacks on Sept. 11, 2001, 298 F.Supp.3d 631 (S.D.N.Y. 2005).

I. THE SOLUTION: A CYBER ATTACK EXCEPTION TO THE FSIA—ABSOLUTE BARRIERS VS. PROTECTED BUBBLES

Congress should amend the FSIA and add a new exception to address the growing problem of cyberattacks. This paper is not the first to make the case for a new cyber exception. There are a growing number of commentators putting forward options for expanding the FSIA in light of 21st century challenges in cyberspace. A member of Congress has even proposed a bill to enact a cyberattack exception.[44] Critics, such as Chimène Keitner, argue the bill and other proposals for a cyberattack exception use overbroad language that fails to capture typical malicious cyberattacks and might hamstring legitimate state uses of cyberspace.[45] This paper agrees with both: the FSIA provides a potential avenue for addressing state-sponsored cyberattacks, and the prior proposals would create more problems than they solve (and do not account for cybersecurity contractors). Rather than using the FSIA to build an "absolute barrier" against any cyberattacks, this paper argues for creating "protected bubbles" around two particularly vulnerable targets—trade secrets and human rights activists.

A. Absolute barriers: prior proposals are too broad

Three authors—Alexis Haller, Paige Anderson, and Benjamin Kurland—put forward separate proposals for a new cyberattack exception to the FSIA, although they all contain the same fatal flaw by creating an absolute barrier against cyberattacks.[46] Each proposal is comprehensive and contains useful suggestions, the advantages and disadvantages of which are worth highlighting, before addressing their shared pitfall.

In his proposal, Haller emphasizes the provisions of execution of judgments and attachment of assets, particularly under the terrorism exception. In addition to jurisdictional immunity, the FSIA provides immunity from pre-judgment attachment and post-judgment execution of government property. As part of the 2008 terrorism exception amendment, Congress loosened the attachment and execution provisions, which previously stymied plaintiffs from receiving compensation, despite winning on the merits.[47] These provisions are important because they raise the costs on perpetrating states by allowing a prevailing plaintiff to attach property in the United States belonging to the defendant foreign state and its agencies or

[44] Homeland and Cyber Threat Act, H.R. 4189, 116th Cong. (2019).
[45] *See* Chimène Keitner & Allison Peters, *Private Lawsuits Against Nation-States Are Not the Way to Deal With America's Cyber Threats*, LAWFARE BLOG (June 15, 2020, 9:09 AM), https://www.lawfareblog.com/private-lawsuits-against-nation-states-are-not-way-deal-americas-cyber-threats.
[46] *See* Alexis Haller, *The Cyberattack Exception to the Foreign Sovereign Immunities Act: A Proposal to Strip Sovereign Immunity When Foreign States Conduct Cyberattacks Against Individuals and Entities in the United States*, FSIA LAW (Feb. 19, 2017), https://fsialaw.com/2017/02/19/the-cyberattack-exception-to-the-foreign-sovereign-immunities-act-a-proposal-to-strip-sovereign-immunity-when-foreign-states-engage-in-cyberattacks-against-individuals-and-entities-in-the-united-stat/; Paige C. Anderson, *Cyber Attack Exception to the Foreign Sovereign Immunities Act*, 102 CORNELL L. REV. 1087 (2017); Benjamin Kurland, *Sovereign Immunity in Cyber Space: Towards Defining a Cyber-Intrusion Exception to the Foreign Sovereign Immunities Act*, 10 J. NAT'L SECURITY L. & POL'Y, 225, 268-69 (2019).
[47] National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, Div. A, § 1083 (2008), 122 Stat. 338 (codified at 28 U.S.C. § 1605A).

instrumentalities.[48] Removing immunity from state property is a powerful means for changing the cost-benefit calculus of hacking states.

Anderson models her proposal largely on the terrorism exception under §1605A. She notes that Congress included material support for terrorism because "material support…is just as reprehensible, and just as necessary to deter, as perpetration."[49] Hinting at the role of cybersecurity contractors, Anderson includes a material provision in her proposal "to account for the possibility of states using individuals who are not government employees to carry out cyber attacks."[50] Anderson's material support provision is a step in the right direction by outlining the damage even supporting actors may cause. Nevertheless, the model language of her proposal does not address the issue of contractors directly because it still refers to material support by a foreign state.[51]

Kurland's proposal also draws from the terrorism exception, particularly for its punitive damages. In conjunction with attachment and execution of property, punitive damages are important because they further raise the costs of malicious cyberactivity. Additionally, Kurland proposes using a similar designation process as the state sponsor exception, whereby suits may only be brought against a state designated by the Secretary of State as a "cyber-intruder."[52] While a designation requirement would limit the effect of Kurland's broad prohibition on cyberattacks, it would go too far by effectively stonewalling most suits even before they begin. Unlike terrorism, many states conduct cyberattacks. The executive branch is unlikely to upset so many diplomatic relationships with "cyber-intruder" designations, as evidenced by the United States' poor track record on calling out cyberattacks. As Anderson notes, the United States stayed quiet and refused to make public attribution long after Chinese hackers stole data on 21.5 million Americans from the U.S. Office of Personnel Management in 2015.[53]

Despite a few differences, all three proposals would remove jurisdictional immunity and create a substantive private cause of action for cyberattacks. Each proposal uses slightly different definitions of cyberattack; however, they share similarly broad language removing immunity for cyberattacks by states with only a few limits. Haller suggests drawing from federal anti-hacking laws, and Kurland explicitly does so, using language from the Wiretap Act and the Computer Fraud and Abuse Act ("CFAA").[54] Anderson's proposal would prohibit cyber activity including "unprivileged access to or use of proprietary electronically-stored information, impairment of the function of a computer system, damage to computer hardware, or the provision of material support or resources for such acts."[55] Anderson would limit cyberattacks by requiring they produce "substantial effects" in the United States;[56] however, she provides no definition for "substantial," which would likely create significant unpredictability in judicial outcomes.

Anderson also argues her proposal is properly tailored and avoids issues of reciprocity because "all [it] would do…is exclude *private* parties as legitimate targets for foreign

[48] Haller, *supra* note 86.
[49] Anderson, *supra* note 86, at 1100.
[50] Anderson, *supra* note 86, at 1103.
[51] Anderson, *supra* note 86, at 1102.
[52] Kurland, *supra* note 86, at 270.
[53] Anderson, *supra* note 86, at 1107.
[54] Haller, *supra* note 86; Kurland, *supra* note 86, at 263.
[55] Anderson, *supra* note 86, at 1102.
[56] Anderson, *supra* note 86, at 1102.

governments."[57] Private parties, however, are not per se illegitimate targets. Law enforcement investigations of transnational criminal organizations and intelligence collection on terrorist organizations are examples of states targeting private parties. Few would argue these are illegitimate purposes. States with legitimate purposes may need to access networks of private companies, even if they are not stealing trade secrets. Anderson's proposal creates a binary distinction between public and private worlds that is unhelpful for delineating legitimate and illegitimate targets.

The focus by all three proposals on the means—form of cyberattacks—rather than the ends—targets of cyberattacks—is imprudent because there are legitimate uses for cyberspace. Other exceptions, such as terrorism, are easier to draw lines around because it is readily accepted that any form of terrorism is not legitimate statecraft. There is no such consensus around cyberspace. It is an immense hurdle to properly tailor what forms of cyberattacks are permissible, particularly in a field which rapidly innovates new forms of cyberattacks. These proposals tinker around the edges, but each focuses on regulating forms of cyberattacks that are overly broad because they capture a wide range of legitimate and illegitimate cyberattacks. And legitimate and illegitimate cyberattacks are not differentiated by the form of the cyberattack. For example, a state's cyberattack on a foreign military installation and on a hospital may involve the same cyber tools; however, most people would likely accept that the cyberattack on the hospital is an illegitimate cyberattack. The distinction is driven by the nature of the target. Therefore, an absolute barrier on forms, rather than the targets, of cyberattacks misses the mark.

[Excerpted conclusion provided below]

CONCLUSION

Amending the FSIA will be no easy task. Foreign sovereign immunity in cyberspace raises competing interests related to reciprocity, legitimate uses of cyberattacks, the role of private actors, and norm creation. The new cyberattack exception proposed by this paper strikes the proper balance. Cybersecurity contractors providing services for legitimate activities would enjoy derivative immunity. Companies, such as NSO, who create and sell malware to states using it to threaten human rights would find their immunity stripped away in U.S. courts. The new exception would ensure injured private parties—individuals and companies—are able to affirmatively assert their claims in U.S. courts against malicious state sponsored cyberattacks. The legislative and executive branches are more likely to enact a narrowly tailored exception than a broad proposal prohibiting any cyberattacks. As cyberspace becomes an ever more dynamic and critical domain for competition, the United States should lead in developing prudent norms for legitimate state practice. Cyber risks are rapidly proliferating, and U.S. and international law must catch up. This paper's exception would provide an effective legislative patch to the FSIA's cyber gaps. It is time foreign sovereign immunity receives an update for the digital era.

[57] Anderson, *supra* note 86, at 1107-08.

Upper-Level Writing Requirement Final Paper

The following is an excerpt from a paper submitted on March 15, 2020 without external editing for Professor David Stewart's class on "Current Issues in Transnational (Private International) Law." This paper addresses state-sponsored cyber attacks and the Foreign Sovereign Immunities Act, specifically whether the FSIA provides an avenue of redress for victims of cyber attacks. These excerpted pages cover pertinent legal research and analysis that reviews other proposals to amend the FSIA and then presents its own solution.

The full paper, which was published subsequently with revisions, can be found at: Adam L. Silow, "Bubbles over Barriers: Amending the Foreign Sovereign Immunities Act for Cyber Accountability," 12 J. NAT'L SEC. L. & POL'Y 659 (2022), available at https://jnslp.com/wp-content/uploads/2022/06/Silow_Amending_the_Foreign_Sovereign_Immunities_Act_for_Cyber_Accountability.pdf.

[Excerpted passages]

A. Private suits are blocked by the current FSIA

Compared to government responses, such as prosecutions and offensive cyber, private responses directly by victims have seen even less success because of direct restrictions under the FSIA. The issue of private cybersecurity contractors adds another complicating factor to the question of liability. The FSIA does not provide a clear answer on whether private contractors receive derivative foreign sovereign immunity based on their government clients. Contractors providing legitimate services for intelligence, defense, and law enforcement activities are left uncertain about the potential liability they might face. Furthermore, the FSIA was passed before the modern digital era and does not properly account for contemporary cyber threats. Even the more recently passed exceptions do not account for cyberattacks.

1. Ambiguous derivative immunity creates uncertainty and liability risks for contractors

Returning to the ongoing litigation between WhatsApp and NSO in the Northern District of California—concerning foreign governments using NSO's Pegasus spyware to hack WhatsApp users—discovery stalled over the issue of derivative foreign sovereign immunity.[1] NSO filed a motion to dismiss WhatsApp's complaint, arguing in part, that the District Court lacked subject matter jurisdiction because NSO enjoyed derivative foreign sovereign immunity based on its alleged foreign sovereign clients. NSO argued for immunity because it believed—accurately so (as outlined in the next section)—that none of the current FSIA exceptions apply to

[1] The closest any of the direct victims have come to challenging NSO Group is a lawsuit by Amnesty International (AI) against NSO Group in Israel to have the company's export license revoked for monitoring human rights activists, including one of AI's researchers. The Tel Aviv District Court Judge dismissed the lawsuit for failure to "substantiate" the claim, finding the Israeli Defense Ministry's "thorough and meticulous" process for granting export licenses was sufficiently sensitive to human rights violations. Oliver Holmes, *Israeli Court Dismisses Amnesty Bid to Block Spyware Firm NSO*, GUARDIAN (July 13, 2020), https://www.theguardian.com/world/2020/jul/13/israeli-court-dismisses-amnesty-bid-to-block-spyware-firm-nso.

NSO's conduct, meaning WhatsApp, and other injured parties, would not have a viable claim for relief against NSO.

The FSIA does not explicitly provide derivative immunity for contractors. Consequently, the question has been left to judicial interpretation. The Ninth Circuit has not previously adopted a rule regarding derivative foreign sovereign immunity, but NSO argued that the District Court in Northern California should adopt the rule outlined by the Fourth Circuit in *Butters v. Vance*.[2] The Fourth Circuit upheld derivative foreign sovereign immunity when an employee of a U.S. security company hired by Saudi Arabia sued the company for gender discrimination. The Fourth Circuit drew its conclusion from the rule that U.S. domestic contractors receive the privilege of derivative immunity when contracting for the United States government; the Fourth Circuit held that it is "but a small step to extend this privilege to the private agents of foreign sovereigns."[3]

The Northern California District Court, though, found NSO was asking for a larger step than it conceded. On July 16, 2020, Chief District Court Judge Phyllis J. Hamilton denied NSO's motion to dismiss and rejected the adoption of derivative foreign sovereign immunity.[4] Judge Hamilton emphasized that the Ninth Circuit has not adopted the derivative rule from *Butters*, and even if it had, NSO would not satisfy the standard because it is incorporated outside the United States.[5] Judge Hamilton also objected to the Fourth Circuit's reasoning, arguing "there are different rationales underlying domestic and foreign sovereign immunity."[6] *Domestic* sovereign immunity is grounded in exercising valid constitutional authority from the U.S. federal government. *Foreign* sovereign immunity, on the other hand, is "a matter of grace and comity on the part of the United States," wrote Judge Hamilton.[7] Judge Hamilton did not imply derivative foreign sovereign immunity is unconstitutional, or even unwise as a policy matter. Rather, her reasoning suggests the doctrine of derivative foreign sovereign immunity is for the legislative and executive branches to resolve, not the judiciary.

There is an additional reason why derivative immunity is best left to the other branches—customary international law ("CIL"). Judge Hamilton slightly overstated the important of grace and comity in outlining the basis of foreign sovereign immunity. Scholar David Stewart writes that grace and comity, despite frequent reference, "are nowhere to be found" in Chief Justice John Marshall's "seminal" opinion in *The Schooner Exchange*, which first recognized foreign sovereign immunity.[8] Instead, Marshall's opinion "refers to the usage and principles adopted by

[2] 225 F.3d 462, 466 (4th Cir. 2000).
[3] *Id.*
[4] Although it is beyond the scope of this paper, the District Court's approximately seventy-four-page order covers a host of fascinating, complex cyber issues, including how personal jurisdiction is analyzed under the tests of purposeful direction and purposeful availment for foreign defendants alleged to have hacked into the forum state. WhatsApp Inc. v. NSO Grp. Techs. Ltd., 472 F.Supp.3d 649 (N.D. Cal. July 16, 2020) (finding that the court had subject matter jurisdiction and personal jurisdiction, while granting the motion to dismiss WhatsApp's fourth cause of action for trespass to chattels because WhatsApp failed to allege actual damage to infected servers).
[5] *Id.* at 667 ("In Butters, the defendant asserting derivative sovereign immunity was a U.S. corporation and the Fourth Circuit's reasoning indicated that the U.S. citizenship of the company was necessary to its holding.").
[6] *Id.* (citing Broidy Cap. Mgmt. L.L.C. v. Muzin, No. 19-CV-0150 (DLF), 2020 WL 1536350, at *7 (D.D.C. Mar. 31, 2020) (denying derivative foreign sovereign immunity to defendant companies working for Qatar, who were sued for hacking into the plaintiff's computers in response to his criticism of Qatar)).
[7] *Id.* (quoting Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983).
[8] STEWART, *supra* note 27, at 6; *see also* Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136–37 (1812).

the unanimous consent of nations—what today we refer to as customary international law."[9] CIL is created by opinio juris—a sense of legal obligation—and state practice—requiring the custom be widespread, longstanding, and generally accepted by other states.

Congress and the President are the primary drivers of U.S. state practice as part of CIL. Under the U.S. Constitution, the executive and legislative branches are given primacy over the judicial branch in foreign affairs. The President, under Article II, is commander-in-chief of the armed services and has the power to conduct diplomacy.[10] Under Article I, Congress is given the foreign commerce power and authority to create and maintain the military, declare war, and "define and punish piracies and felonies committed on the high seas, and *offenses against the law of nations*" (emphasis added).[11] Although foreign sovereign immunity is entrenched in CIL, derivative immunity is not. Congress should pass, and the President should sign, derivative foreign sovereign immunity into law. Doing so would not only produce good policy in an otherwise murky area, but it would also begin a new state practice that could eventually crystalize into CIL.

Derivative foreign sovereign immunity would create certainty because cybersecurity companies contracting with states are currently operating in a gray area of liability. For most contractor industries—such as construction or physical security—immunity in foreign courts will not be an issue as they only need to worry about legal liability from the domestic jurisdiction in which they contract in. Contractors in the cybersecurity industry, however, are at a higher risk of complex, foreign litigation because they provide services and products which can cause substantial effects and harm across borders. Cybersecurity contractors' cross-border activities affect a broader pool of potential foreign plaintiffs and raise complicated conflict of laws questions regarding jurisdiction, choice of law, and judgment-recognition. It is in the United States' interest to clarify its position through domestic legislation and further a new international custom of derivative foreign sovereign immunity to create legal certainty for U.S. and foreign cybersecurity contractors.

Leaving the question of derivative immunity to the courts will not solve the problem. If U.S. contractors are sued outside the Fourth Circuit, it is unlikely they would receive immunity. The derivative immunity question in the WhatsApp lawsuit is now on appeal before the Ninth Circuit. If the Ninth Circuit rejects derivative foreign sovereign immunity, cybersecurity companies supporting legitimate state functions of law enforcement and national security will be exposed to litigation risks, even though their government partners will enjoy immunity. On the other hand, if the Ninth Circuit extends NSO derivative immunity, it is likely NSO will escape liability for its actions because none of the FSIA's current exceptions will apply.

2. Current FSIA exceptions do not apply to cyberattacks

The FSIA provides nine distinct exceptions for which states may be held liable.[12] Assuming immunity is not waived by a state, three other exceptions—commercial activity,

[9] STEWART, *supra* note 27, at 6.
[10] U.S. CONST. art. II, § 2, cl. 1-2.
[11] U.S. CONST. art. I, § 8, cl. 3, 10-15. More broadly, Congress can influence U.S. foreign affairs through its power of the purse and the necessary and proper clause. U.S. CONST. art. I, § 9, cl. 7; *id.* art. I, § 8, cl. 18.
[12] *See generally* STEWART, *supra* note 27, at 47-136 (outlining the scope and elements of all nine exceptions, which include waiver, commercial activity, expropriations, rights in certain kinds of property in the United States,

tortious conduct, and terrorism—are potentially relevant in the context of cyberspace. None, however, provide injured parties with an effective avenue of accountability—whether declarative, injunctive, or compensatory relief—in U.S. courts against hacking states.

The most litigated FSIA exception is for commercial activity.[13] The commercial activity exception strips sovereign immunity for a state conducting commercial activities as a private individual or company would in business.[14] The statute defines commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act."[15] In addition, the FSIA emphasizes commercial activity is determined by its nature, not its purpose.[16] Thus, commercial activity is not based on a profit motive, but "whether the government's particular actions (whatever the motive behind them) are the *type* of actions by which a private party engages in commerce."[17] The Ninth Circuit recently concluded that "a foreign government's conduct of clandestine surveillance and espionage against a national of another nation in that other nation is not 'one in which commercial actors typically engage.'"[18] Cyberattacks against human rights activists—individuals with no clear business connection—are also unlikely to constitute commercial activity.

In a recent article, Jerry Goldman and Bruce Strong argue that the commercial activity exception covers hacking trade secrets based on a D.C. District Court decision in *Azima v. RAK Investment Authority*.[19] In that case, the District Court found that a UAE state investment entity's hacking of a businessman constituted commercial activity under the FSIA.[20] The District Court focused on the overlap in timing, emphasizing that the UAE entity hacked the businessman as mediation began between both parties.[21] Based on the *Azima* Court's reasoning, Goldman and Strong argued that "steal[ing] trade secrets for the purpose of giving their own companies a competitive commercial advantage" would "neatly fall under the commercial activity exception."[22] Not so. Hacking during mediations is different from cyber economic espionage.

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noncommercial torts, enforcement of arbitral agreements and awards, state-sponsored terrorism, maritime liens and preferred mortgages, and counterclaims); *see also* 28 U.S.C. §§ 1605(a)(1)-(6), 16-5(A), 1605(b)-(d), 1607.

[13] STEWART, *supra* note 27, at 50-51.

[14] 28 U.S.C. § 1605(a)(2).

[15] 28 U.S.C. § 1603(d).

[16] *Id.*

[17] Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 607 (1992) (finding Argentina's issuance of bonds with repayment in U.S. dollars in several markets, including New York, was a commercial activity with a "direct effect in the United States" under the FSIA).

[18] Broidy Cap. Mgmt., L.L.C. v. Qatar, 982 F.3d 582, 594 (9th Cir. 2020); *see also* Democratic Nat'l Comm. v. Russian Federation, 392 F.Supp.3d 410, 429 (S.D.N.Y. 2019) (finding that Russia's hacks against the Democratic National Committee in 2015 did not constitute commercial activity because "transnational cyberattacks are not the 'type of actions by which a private party engages in trade and traffic or commerce'").

[19] Jerry Goldman & Bruce Strong, *Overcoming Immunity of Foreign Gov't Cyberattack Sponsors*, LAW360 (Dec. 2, 2020 5:07 PM), https://www.law360.com/cybersecurity-privacy/articles/1332591/overcoming-immunity-of-foreign-gov-t-cyberattack-sponsors?nl_pk=7733056d-73e1-469d-a74f-7a8f7677c91c&utm_source=newsletter&utm_medium=email&utm_campaign=cybersecurity-privacy.

[20] Azima v. RAK Inv. Auth., 305 F.Supp.3d 149 (D.D.C. Mar. 30, 2018), *rev'd*, 926 F.3d 870 (D.C. Cir. 2019) (reversing the District Court on separate grounds because a forum selection clause established England as the proper venue).

[21] AZIMA 166 ("Azima starts off noting that the hacking of his computer began in October of 2015 and continued through the summer of 2016—a time period that roughly corresponds with the time in which Azima served as a mediator between RAKIA and its former CEO.")

[22] Goldman & Strong, *supra* note 59.

Unlike the facts in *Azima*, hacks of trade secrets are unlikely to occur simultaneous with a commercial activity. A company receiving the stolen trade secrets will be unable to take commercial advantage of the information likely until long after the actual hack is complete. Establishing the causal link without an easy temporal inference will require significantly more evidence and resources. The District Court's reliance in *Azima* on a close-in-time overlap in activity means plaintiffs will struggle to bring cases involving cyber economic espionage that link hacks with ongoing commercial activity.

The FSIA also includes a noncommercial tort exception, which provides that states are not granted immunity for cases:

> in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, *occurring in the United States* and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment (emphasis added).[23]

In 2015, one author envisaged the FSIA's tort exception as a possible path for holding state-sponsors of cyberattacks accountable.[24] The author pointed to two cases—*Letelier v. Republic of Chile*, and *Liu v. Republic of China*—in which assassinations by foreign agents in the United States satisfied the tort exception.[25] Nonetheless, the D.C. Circuit refused to apply the tort exception in the context of a cyberattack by Ethiopia against a human rights activist in Maryland.[26] The D.C. Circuit distinguished the foreign cyberattack from the assassination cases by emphasizing the tort exception's situs requirement, which provides that the entire tort must occur in the United States. Although the assassins in *Letelier* and *Liu* were foreign agents, their tortious conduct occurred in the United States—the Taiwanese agent shot a man California, and the Chilean agents "constructed, planted and detonated a car bomb in Washington, D.C."[27] While there may be an argument that the assassination planning occurred abroad, the D.C. Circuit emphasized that the injury caused by Ethiopia's cyberattack included not only an "intent to spy" from abroad but also an "initial dispatch" of malware in Ethiopia, meaning "integral aspects of the final tort…lay solely abroad."[28] States rely on cyberattacks precisely because of the ability to affect targets in a different location from where the attack is launched. Cyberspace provides a means of covertly reaching across borders and harming entities or states that are otherwise inaccessible. Therefore, most cyberattacks are likely to run afoul of the tort exception's situs requirement.

Congress has amended the FSIA several times related to terrorism. In 1996, Congress added an exception for state-sponsored terrorism, removing immunity for certain acts of terrorism, such as torture, extrajudicial killing, aircraft sabotage, hostage taking, or material support.[29] An important provision in the new exception provided that immunity would only be removed for states formally designated by the U.S. Secretary of State as a sponsor of terrorism.

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[23] 28 U.S.C. § 1605(a)(5).
[24] Scott A. Gilmore, *Suing the Surveillance States: The (Cyber) Tort Exception to the Foreign Sovereign Immunities Act*, 46 COLUM. HUM. RTS. L. REV. 223 (2015); Goldman & Strong, *supra* note 59.
[25] Letelier v. Republic of Chile, 488 F.Supp. 665 (D.D.C. 1980); Liu v. Republic of China, 892 F.2d 1419 (9th Cir. 1989).
[26] Doe v. Federal Democratic Republic of Ethiopia, 851 F.3d 7, 11 (D.C. Cir. 2017)
[27] *Id.*
[28] *Id.*
[29] Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 12241 (1996) (codified at 28 U.S.C. § 1605(a)(7)).

With the state sponsors of terrorism list, the executive branch acts as a gatekeeper, tightly limiting the number of countries who face liability. When the terrorism exception passed in 1996, only six states were on the list: Cuba, Iran, Libya, North Korea, Sudan, Syria, and Iraq. As of March 2021, only Cuba, North Korea, Iran, and Syria remain.[30]

Congress broadened the terrorism exception in 2008 under 28 U.S.C. § 1605A by removing the bar on punitive damages and creating a federal cause of action that could be applied retroactively.[31] In 2016, Congress passed—over the president's veto—an additional exception under § 1605B known as the Justice Against Sponsors of Terrorism Act (JASTA).[32] Frustrated by the executive branch's refusal to list certain countries, specifically Saudi Arabia, Congress passed JASTA to provide another legal avenue against perpetrating states, regardless of designation by the Secretary of State. JASTA also removed the entire tort requirement for acts of international terrorism that take place in the United States, as defined by the Antiterrorism Act (ATA).[33] Nonetheless, plaintiffs have not yet succeeded in bringing claims under JASTA. For example, the families of the 9/11 victims protested the removal of Sudan in December 2020 from the state sponsors of terrorism list because it would remove their ability to bring claims under § 1605A and they did not see JASTA as a viable path for their claims against Sudan.[34] Despite Congress' intentions, JASTA has not yet demonstrated that it is a suitable alternative to §1605A.

The FSIA's terrorism exceptions under either §1605A or §1605B (JASTA) were created to address a specific harm—violent terrorist acts—and, therefore, do not fit well for harms in cyberspace. Nonetheless, some authors argue otherwise.[35] Goldman and Strong acknowledge that the state sponsor exception "does not at first blush appear to apply to hacking," but continue on to provide examples they believe could apply.[36] They argue hacking an airplane or air traffic control could constitute aircraft sabotage, hacking a hospital causing patients to die without

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[30] *See* State Sponsors of Terrorism, U.S. DEP'T STATE, https://www.state.gov/state-sponsors-of-terrorism/#:~:text=Currently%20there%20are%20three%20countries,)%2C%20Iran%2C%20and%20Syria.&text=For%20more%20details%20about%20State,in%20Country%20Reports%20on%20Terrorism (last visited March 16, 2021).

[31] 28 U.S.C. § 1605A (including three other limitations: 1. a ten-year limitations period; 2. the claimant or victim was a U.S. national, member of the armed forces, or otherwise a U.S. employee or contractor; and 3. the claimant must first afford the "foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration").

[32] Pub. L. No. 114-222, 130 Stat. 852 (2016); *see* Rachael E. Hancock, *'Mob-Legislating': JASTA's Addition to the Terrorism Exception to Foreign Sovereign Immunity*, 103 CORNELL L. REV. 1293, 1294 (2018) ("On September 28, 2016, a politically divided United States Senate overrode President Barack Obama's veto for the first and only time in a particularly decisive vote: 97–1.").

[33] 18 U.S.C. § 2331 (defining international terrorism as activities involving: a) violent acts or acts dangerous to human life that b) appear to be intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by mass destruction, assassination, or kidnapping).

[34] Lara Jakes, *U.S. Prepares to Take Sudan Off List of States That Support Terrorism*, N.Y. TIMES (Sept. 24, 2000), https://www.nytimes.com/2020/09/24/us/politics/us-sudan-terrorism.html (The delisting of Sudan resolved Sudan's payments to victims of the 1998 East Africa Embassy bombings and the 2000 Cole bombing, but 9/11 families also believe they have viable claims against Sudan for supporting Al-Qaeda. The 9/11 victims' families "broadly objected to the immunity legislation before their own legal cases against Sudan are resolved.").

[35] *See, e.g.*, John J. Martin, *Hacks Dangerous to Human Life: Using JASTA to Overcome Foreign Sovereign Immunity in State-Sponsored Cyberattack Cases*, 121 COLUM. L. REV. (forthcoming Jan. 2021); Goldman & Strong, *supra* note 59 (arguing that both § 1605A and § 1605B apply).

[36] Goldman & Strong, *supra* note 59.

access to medical care might be extrajudicial killing, and hacking "infrastructure that traps people in a particular location" might be hostage-taking.[37] The authors provide no evidence that any of these hyper-specific examples are widespread phenomena or have ever occurred. For example, in September 2020, a ransomware attack on a German hospital was suspected as causing "the first known death from a cyberattack,"[38] but police later clarified the patient's poor health was the cause of death and "the delay [in medical care from the ransomware] was of no relevance to the final outcome."[39] While a cyberattack that causes physical damage to humans may constitute a violent terrorist act, such attacks make up few, if any, of the current wave of cyberattacks. In addition, plaintiffs relying on §1605A's state sponsors exception are currently only able to sue the four listed states—Cuba, Iran, North Korea, and Syria. Other state sponsors of malicious cyberactivity, notably Russia and China, face no liability under the state sponsors exception.

John Martin writes that cyberattacks fit under §1605B (JASTA), which relies on the substantive elements under the ATA, rather than the limited acts enumerated in §1605A's state sponsors exception. Martin argues the ATA's inclusion of "acts dangerous to human life" is broad enough to cover cyberattacks.[40] JASTA, according to Martin, could provide protection for political dissidents if, for example, "the act of distributing secret information after a data breach could endanger human life if it contains personal information about an individual that then subjects them to potential targeting and harassment."[41] Plaintiffs, however, would need to prove a complicated chain of causation connecting the state to the hack to the breached secret information to harassment that causes dangers to human life. Stealing trade secrets is even more attenuated to dangerous affects to human life. Even if human rights activists have a potentially viable path under JASTA, cyberattacks causing massive economic damage without endangering human lives would go unaddressed. Martin is also too quick to dismiss the argument that JASTA was intended "for one specific purpose: to allow [9/11] victims' families to sue Saudi Arabia."[42] And even the 9/11 families' claims, for which the statute was created, have not gone far under JASTA.[43] Judges will likely be wary to read into JASTA a new type of claim for cyberattacks that Congress did not specifically anticipate. Applying cyberattacks to these terrorism statutes is like fitting a square peg in a round hole. The state sponsors exception and JASTA were created to mitigate harm for physically destructive acts of terrorism. These exceptions were not drafted to capture the less tangible, but significant harms created by malicious states in cyberspace.

In summary, cyberattacks do not fit under the FSIA's current exceptions. The current status of the law for foreign sovereign immunity risks creating perverse outcomes for actors in cyberspace. Judge-made derivative foreign sovereign immunity without a new FSIA exception for cyberattacks will mean the worst of both worlds: no accountability for cyberattacks with blanket immunity afforded to both states *and* their cybersecurity contractors.

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[37] Goldman & Strong, *supra* note 59.
[38] Melissa Eddy & Nicole Perlroth, *Cyber Attack Suspected in German Woman's Death*, N.Y. TIMES (Sept. 18, 2020), https://www.nytimes.com/2020/09/18/world/europe/cyber-attack-germany-ransomeware-death.html.
[39] Patrick Howell O'Neill, *Ransomware Did Not Kill a German Hospital Patient*, MIT TECH. REV. (Nov. 12, 2020), https://www.technologyreview.com/2020/11/12/1012015/ransomware-did-not-kill-a-german-hospital-patient/.
[40] 18 U.S.C. § 2331(1)(A).
[41] Martin, *supra* note 75, at 38.
[42] Martin, *supra* note 75, at 45.
[43] *See In re* Terrorist Attacks on Sept. 11, 2001, 298 F.Supp.3d 631 (S.D.N.Y. 2005).

I. THE SOLUTION: A CYBER ATTACK EXCEPTION TO THE FSIA—ABSOLUTE BARRIERS VS. PROTECTED BUBBLES

Congress should amend the FSIA and add a new exception to address the growing problem of cyberattacks. This paper is not the first to make the case for a new cyber exception. There are a growing number of commentators putting forward options for expanding the FSIA in light of 21st century challenges in cyberspace. A member of Congress has even proposed a bill to enact a cyberattack exception.[44] Critics, such as Chimène Keitner, argue the bill and other proposals for a cyberattack exception use overbroad language that fails to capture typical malicious cyberattacks and might hamstring legitimate state uses of cyberspace.[45] This paper agrees with both: the FSIA provides a potential avenue for addressing state-sponsored cyberattacks, and the prior proposals would create more problems than they solve (and do not account for cybersecurity contractors). Rather than using the FSIA to build an "absolute barrier" against any cyberattacks, this paper argues for creating "protected bubbles" around two particularly vulnerable targets—trade secrets and human rights activists.

A. Absolute barriers: prior proposals are too broad

Three authors—Alexis Haller, Paige Anderson, and Benjamin Kurland—put forward separate proposals for a new cyberattack exception to the FSIA, although they all contain the same fatal flaw by creating an absolute barrier against cyberattacks.[46] Each proposal is comprehensive and contains useful suggestions, the advantages and disadvantages of which are worth highlighting, before addressing their shared pitfall.

In his proposal, Haller emphasizes the provisions of execution of judgments and attachment of assets, particularly under the terrorism exception. In addition to jurisdictional immunity, the FSIA provides immunity from pre-judgment attachment and post-judgment execution of government property. As part of the 2008 terrorism exception amendment, Congress loosened the attachment and execution provisions, which previously stymied plaintiffs from receiving compensation, despite winning on the merits.[47] These provisions are important because they raise the costs on perpetrating states by allowing a prevailing plaintiff to attach property in the United States belonging to the defendant foreign state and its agencies or

[44] Homeland and Cyber Threat Act, H.R. 4189, 116th Cong. (2019).
[45] *See* Chimène Keitner & Allison Peters, *Private Lawsuits Against Nation-States Are Not the Way to Deal With America's Cyber Threats*, LAWFARE BLOG (June 15, 2020, 9:09 AM), https://www.lawfareblog.com/private-lawsuits-against-nation-states-are-not-way-deal-americas-cyber-threats.
[46] *See* Alexis Haller, *The Cyberattack Exception to the Foreign Sovereign Immunities Act: A Proposal to Strip Sovereign Immunity When Foreign States Conduct Cyberattacks Against Individuals and Entities in the United States*, FSIA LAW (Feb. 19, 2017), https://fsialaw.com/2017/02/19/the-cyberattack-exception-to-the-foreign-sovereign-immunities-act-a-proposal-to-strip-sovereign-immunity-when-foreign-states-engage-in-cyberattacks-against-individuals-and-entities-in-the-united-stat/; Paige C. Anderson, *Cyber Attack Exception to the Foreign Sovereign Immunities Act*, 102 CORNELL L. REV. 1087 (2017); Benjamin Kurland, *Sovereign Immunity in Cyber Space: Towards Defining a Cyber-Intrusion Exception to the Foreign Sovereign Immunities Act*, 10 J. NAT'L SECURITY L. & POL'Y, 225, 268-69 (2019).
[47] National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, Div. A, § 1083 (2008), 122 Stat. 338 (codified at 28 U.S.C. § 1605A).

instrumentalities.[48] Removing immunity from state property is a powerful means for changing the cost-benefit calculus of hacking states.

Anderson models her proposal largely on the terrorism exception under §1605A. She notes that Congress included material support for terrorism because "material support…is just as reprehensible, and just as necessary to deter, as perpetration."[49] Hinting at the role of cybersecurity contractors, Anderson includes a material provision in her proposal "to account for the possibility of states using individuals who are not government employees to carry out cyber attacks."[50] Anderson's material support provision is a step in the right direction by outlining the damage even supporting actors may cause. Nevertheless, the model language of her proposal does not address the issue of contractors directly because it still refers to material support by a foreign state.[51]

Kurland's proposal also draws from the terrorism exception, particularly for its punitive damages. In conjunction with attachment and execution of property, punitive damages are important because they further raise the costs of malicious cyberactivity. Additionally, Kurland proposes using a similar designation process as the state sponsor exception, whereby suits may only be brought against a state designated by the Secretary of State as a "cyber-intruder."[52] While a designation requirement would limit the effect of Kurland's broad prohibition on cyberattacks, it would go too far by effectively stonewalling most suits even before they begin. Unlike terrorism, many states conduct cyberattacks. The executive branch is unlikely to upset so many diplomatic relationships with "cyber-intruder" designations, as evidenced by the United States' poor track record on calling out cyberattacks. As Anderson notes, the United States stayed quiet and refused to make public attribution long after Chinese hackers stole data on 21.5 million Americans from the U.S. Office of Personnel Management in 2015.[53]

Despite a few differences, all three proposals would remove jurisdictional immunity and create a substantive private cause of action for cyberattacks. Each proposal uses slightly different definitions of cyberattack; however, they share similarly broad language removing immunity for cyberattacks by states with only a few limits. Haller suggests drawing from federal anti-hacking laws, and Kurland explicitly does so, using language from the Wiretap Act and the Computer Fraud and Abuse Act ("CFAA").[54] Anderson's proposal would prohibit cyber activity including "unprivileged access to or use of proprietary electronically-stored information, impairment of the function of a computer system, damage to computer hardware, or the provision of material support or resources for such acts."[55] Anderson would limit cyberattacks by requiring they produce "substantial effects" in the United States;[56] however, she provides no definition for "substantial," which would likely create significant unpredictability in judicial outcomes.

Anderson also argues her proposal is properly tailored and avoids issues of reciprocity because "all [it] would do…is exclude *private* parties as legitimate targets for foreign

[48] Haller, *supra* note 86.
[49] Anderson, *supra* note 86, at 1100.
[50] Anderson, *supra* note 86, at 1103.
[51] Anderson, *supra* note 86, at 1102.
[52] Kurland, *supra* note 86, at 270.
[53] Anderson, *supra* note 86, at 1107.
[54] Haller, *supra* note 86; Kurland, *supra* note 86, at 263.
[55] Anderson, *supra* note 86, at 1102.
[56] Anderson, *supra* note 86, at 1102.

governments."[57] Private parties, however, are not per se illegitimate targets. Law enforcement investigations of transnational criminal organizations and intelligence collection on terrorist organizations are examples of states targeting private parties. Few would argue these are illegitimate purposes. States with legitimate purposes may need to access networks of private companies, even if they are not stealing trade secrets. Anderson's proposal creates a binary distinction between public and private worlds that is unhelpful for delineating legitimate and illegitimate targets.

The focus by all three proposals on the means—form of cyberattacks—rather than the ends—targets of cyberattacks—is imprudent because there are legitimate uses for cyberspace. Other exceptions, such as terrorism, are easier to draw lines around because it is readily accepted that any form of terrorism is not legitimate statecraft. There is no such consensus around cyberspace. It is an immense hurdle to properly tailor what forms of cyberattacks are permissible, particularly in a field which rapidly innovates new forms of cyberattacks. These proposals tinker around the edges, but each focuses on regulating forms of cyberattacks that are overly broad because they capture a wide range of legitimate and illegitimate cyberattacks. And legitimate and illegitimate cyberattacks are not differentiated by the form of the cyberattack. For example, a state's cyberattack on a foreign military installation and on a hospital may involve the same cyber tools; however, most people would likely accept that the cyberattack on the hospital is an illegitimate cyberattack. The distinction is driven by the nature of the target. Therefore, an absolute barrier on forms, rather than the targets, of cyberattacks misses the mark.

[Excerpted conclusion provided below]

CONCLUSION

Amending the FSIA will be no easy task. Foreign sovereign immunity in cyberspace raises competing interests related to reciprocity, legitimate uses of cyberattacks, the role of private actors, and norm creation. The new cyberattack exception proposed by this paper strikes the proper balance. Cybersecurity contractors providing services for legitimate activities would enjoy derivative immunity. Companies, such as NSO, who create and sell malware to states using it to threaten human rights would find their immunity stripped away in U.S. courts. The new exception would ensure injured private parties—individuals and companies—are able to affirmatively assert their claims in U.S. courts against malicious state sponsored cyberattacks. The legislative and executive branches are more likely to enact a narrowly tailored exception than a broad proposal prohibiting any cyberattacks. As cyberspace becomes an ever more dynamic and critical domain for competition, the United States should lead in developing prudent norms for legitimate state practice. Cyber risks are rapidly proliferating, and U.S. and international law must catch up. This paper's exception would provide an effective legislative patch to the FSIA's cyber gaps. It is time foreign sovereign immunity receives an update for the digital era.

[57] Anderson, *supra* note 86, at 1107-08.

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Journal(s)	**Fordham Law Review**
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May 14, 2023

Honorable Kiyo A. Matsumoto
United States District Court
for the Eastern District of New York
Theodore Roosevelt United States Courthouse
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Brooklyn, NY 11201

Dear Judge Matsumoto:

I graduated from Fordham University School of Law in May 2021 where I was the Editor-in-Chief of Fordham Law Moot Court and a member of *Fordham Law Review*. Presently, I am a judicial law clerk in the chambers of the Honorable Lauren F. Louis in the Southern District of Florida. I am respectfully applying for the clerkship with your chambers for the 2025–2026 term or any term thereafter.

Throughout law school, I seized every opportunity to hone my practical skill set including enhancing my research, writing, and advocacy skills. Having had the honor of leading the Fordham Law Moot Court Board, it enabled me to prepare, edit, and review numerous appellate briefs, bench memorandums, and competition problems where I mentored students and honed my editorial skills. Through my own competitive oral advocacy, we were honored with being an award-winning team in the Philip C. Jessup International Law Moot Court Competition. During the competition, I had the unique experience of researching, drafting, and arguing about impactful international issues, such as the contention around the jurisdiction of the International Criminal Court and the International Court of Justice. As a member of *Law Review*, I was able to further my research and writing skills through writing a Note that was published in the *Dartmouth Law Journal*. My Note reviewed the Trump administration's implementation of a notice-and-comment rule regarding the definition of public charge impacting if a noncitizen is determined to be admissible. On the more practical side with the Federal Litigation Clinic, I was able to develop my research and writing skills in drafting complaints, sentencing letters, power of attorney contracts, and Brady Motions. Additionally, during my time at Norton Rose Fulbright, I further enhanced my advocacy skills through drafting motions to compel arbitration, cross examinations in arbitration hearings, and applications including country conditions reports in support of asylum claims.

Attached please find my resume, unofficial law school transcript, and a writing sample. In addition, attached are letters of recommendation from Professor Michael Martin (mwmartin@fordham.edu (212) 636-6934) and Thomas McCormack, Esq. (thomas.mccormack@nortonrosefulbright.com (212) 408-5182). I am able to travel upon minimal notice. Thank you for your time and your kind consideration of my candidacy.

Respectfully yours,

/s/Ashley M. Slater

Ashley M. Slater

ASHLEY M. SLATER

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EDUCATION

Fordham University School of Law, New York, NY
J.D., *cum laude*, May 2021; G.P.A.: 3.45
Honors: *Fordham Law Review*
Fordham Law Moot Court, Editor-in-Chief (2020 – 2021);
2020 Philip C. Jessup International Moot Court Competition,
Sixth Best Oralist and Semi-finalist in Regionals
Brendan Moore Trial Advocacy;
2019 Intraschool Competition Champion
Partial Merit Scholarship
Paul Fuller Scholar (as of May 2021)
Dean's List (2020 – 2021 Academic Year)
Note: *A Public Charge: Can Temporary Benefits Mean Primary Dependence?*, 19 DARTMOUTH L.J. 134 (2021)
Activities: Fordham OUTLaws

New York University, New York, NY
B.A., Global Liberal Studies, May 2016
Major: Politics, Rights, and Development; Minor: French and Spanish
Thesis: Nationalism and the Headscarf Affair: Is Ethnocultural Misrecognition a By-product of Nationalism?
Study Abroad: NYU Florence; Freie Universitat in Berlin, Germany; NYU Paris; and Paris-Sorbonne University

EXPERIENCE

The Honorable Lauren F. Louis, U.S.M.J., U.S. District Court (S.D. Fla.), Miami, FL
Law Clerk — 2023 – 2024 Term

Norton Rose Fulbright U.S. LLP, New York, NY
Associate — October 2021 – December 2022
Summer Associate — Summer 2020

- Researched and drafted a motion for summary judgment in lieu of complaint and corresponding affirmations
- Drafted a motion to compel arbitration and a cross examination for arbitration hearings
- Drafted affidavits for pro bono clients' asylum applications, researched country conditions and prepared reports to further support clients' claims, and translated for client meetings

Lincoln Square Legal Services, Inc., New York, NY
Clinic Student – Federal Litigation Clinic — Spring 2021

- Researched sentencing requirements, applicable power of attorney laws, and merits of a Brady violation claim
- Drafted complaints, Brady motions, sentencing letters, and power of attorney contracts
- Represented clients in both civil and criminal matters in federal court

Research Assistant – Consumer Litigation Clinic — Summer 2019

- Conducted client interviews and assisted with client intake and development for consumer debt defendants
- Assisted in drafting answers, affidavits, and motions to dismiss for debt collection claims

Research Assistant – Immigrant Rights Clinic — Summer 2019

- Researched and drafted client defenses to support asylum applications, U-visas, and SIJS applications
- Drafted pleadings for family court proceedings and assisted with hearings for guardianship applications

Hughes Hubbard & Reed, New York, NY and Paris, France
Litigation Paralegal — June 2016 – July 2018

- Translated and reviewed documents in French and Spanish vital to FCPA investigations
- Researched and translated applicable French bribery and compliance laws
- Translated and assisted immigration proceedings for asylum applications, U-visas, and SIJS applications

LANGUAGE SKILLS

- Fluent in Spanish and French; conversational in Italian; and basic understanding of German

INTERESTS

- Reading classic fiction, painting with Bob Ross tutorials, watching Billy Wilder films, and hiking

FORDHAM UNIVERSITY SCHOOL OF LAW GRADE SHEET

Grade Sheet of	**Ashley M. Slater**
Cumulative GPA	**3.448**

Semester: Fall 2018 **Division:** Day Division

Course Name	Instructor	Grade Earned	Credit Hours	Quality Points
Contracts 4	Sean Griffith	A-	5.000	18.335
Criminal Law 3 & 4	Deborah Denno	B+	3.000	9.999
Legal Process and Quantitative Methods 4	Numerous	P	1.000	.000
Legal Writing and Research D	Jeremy Weintraub	IP	2.000	.000
Property 3 & 4	Nestor Davidson	B+	4.000	13.332
Current Term GPA:	3.472			

Semester: Spring 2019 **Division:** Day Division

Course Name	Instructor	Grade Earned	Credit Hours	Quality Points
Civil Procedure 3 & 4	Howard Erichson	B	4.000	12.000
Constitutional Law 3 & 4	Catherine Powell	B	4.000	12.000
Legislation & Regulation 3 & 4	Aaron Saiger	B+	4.000	13.332
Legal Writing and Research D	Jeremy Weintraub	B+	3.000	9.999
Torts 3 & 4	Benjamin Zipursky	B+	4.000	13.332
Current Term GPA:	3.193			

Semester: Fall 2019 **Division:** Day Division

Course Name	Instructor	Grade Earned	Credit Hours	Quality Points
Advanced Appellate Advocacy	Michelle Marsh	P	3.000	.000
Evidence	Daniel Capra	A	4.000	16.000
Independent Study – Writing Requirement	Joseph Landau	P	2.000	.00
Information Privacy Law	Ari Waldman	B-	3.000	8.001
Professional Responsibility	James Cohen	B+	3.000	9.999
Current Term GPA:	3.400			

Semester: Spring 2020* **Division:** Day Division

Course Name	Instructor	Grade Earned	Credit Hours	Quality Points
Advanced Appellate Advocacy	Michelle Marsh	P	3.000	.000
Corporations	Sean Griffith	P	4.000	.000
Criminal Procedure: Investigative	Daniel Capra	P	3.000	.000
Fundamental Lawyering Skills	Rubin Jay	P	3.000	.000
Current Term GPA:	0.000			

Semester: Fall 2020		**Division:** Day Division			
Course Name		**Instructor**	**Grade Earned**	**Credit Hours**	**Quality Points**
Advanced Appellate Advocacy		Michelle Marsh	P	3.000	.000
Advanced Legal Research Workshop		Alissa Black-Dorward & Kelly Leong	A	3.000	12.000
Civil Litigation Drafting		Christopher Connolly	A-	2.000	7.334
Immigration Law		Jennifer Gordon	B+	4.000	13.332
	Current Term GPA:	3.630			

Semester: Spring 2021		**Division:** Day Division			
Course Name		**Instructor**	**Grade Earned**	**Credit Hours**	**Quality Points**
Advanced Appellate Advocacy		Michelle Marsh	P	3.000	.000
Clinic Casework: Federal Litigation		Michael Martin, Ian Weinstein, & Jennifer Louis-Jeune	A	3.000	12.000
Clinic Seminar: Federal Litigation		Michael Martin, Ian Weinstein, & Jennifer Louis-Jeune	A-	2.000	7.334
Lawyers as Facilitators		John Feerick & Linda Gerstel	A-	3.000	11.001
Securities Regulation		James Jalil	A-	3.000	11.001
	Current Term GPA:	3.758	Dean's List Academic Year 2020–2021		
	Cumulative GPA:	3.448			

Graduation Honors: *Cum Laude*

*Spring 2020 grades are not included in GPA due to the coronavirus pandemic.

Transcript Legend:
https://www.fordham.edu/download/downloads/id/148/transcript_legend.pdf

Fordham University School of Law
150 West 62nd Street
New York, NY 10023

May 06, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write on behalf of Ashley Slater, to recommend her to you without hesitation.

I have worked with Ashley over the last year, as an associate in our litigation practice. She is a very good lawyer. She researches well, writes well, takes initiative, figures things out, and works extremely hard. She worked with me on two trials over the last year, one in the federal court here in New York City and one in arbitration. She was a quick study in all matters. Among other things, she helped me prepare a key cross-examination outline for the key witness in the arbitration. She had never done a cross examination outline before, but she paid very close attention, got the theory of it, listened to instructions as needed, and worked extremely hard to prepare a draft, weaving documents and other materials into the outline. She did great and the cross-exam could not have gone better.

Her best trait to me is that she figures things out, using ingenuity and persistence to get an answer. She works the problem until she solves the problem. That is a very good skill in a lawyer.

All in all, Ashley is off to an excellent start as a lawyer. I understand she is seeking a judicial clerkship. She is a highly motivated, highly skilled young lawyer and I recommend her to you without hesitation.

Very truly yours,

Thomas J. McCormack

Thomas McCormack - thomas.mccormack@nortonrosefulbright.com - 212-408-5182

Fordham University School of Law
150 w 62nd street
New York, NY 10023

May 09, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to recommend Ashley Slater, one of the stars of Fordham Law School's Class of 2021, to be your law clerk. Ashley was the Editor-in-Chief of the Moot Court Board, a member of the Fordham Law Review, and the 2019 Champion of the Moore Trial Advocates intraschool competition. Any one of those achievements would have been an extraordinary law school career. Intelligent, hardworking, analytically adept, a concise and clear writer, productively critical, willing to take initiative, and a leader, Ashley is exceptional, and would be a wonderful addition to your Chambers.

I know Ashley from her time as a legal intern in my Federal Litigation Clinic ("Fed Lit Clinic") during the spring 2021 semester. The Fed Lit Clinic is a five-credit course that combined federal criminal defense cases with an array of federal civil matters, such as prisoner civil rights, police misconduct, employment discrimination, and intellectual property matters. Ashley worked on four different criminal matters, each at a very different stage from the others: a client involved in heavy pre-trial preparation, a client awaiting sentencing, a client accused of violating supervised release, and a client who had recently filed a 28 U.S.C. § 2255 habeas motion.

Supervising Ashley was a pleasure. While representing her clients, Ashley managed to excel in group projects, individualized research, and drafting assignments. She showed great initiative from the very start, as she volunteered to lead our first call of the semester with opposing counsel and made sure to lead a call with each client within the first five weeks of the semester. She also led her team through group conflict that involved dividing group assignments, reflecting the skill sets her peers honored in making her Editor-in-Chief of the Moot Court Board, as she managed her colleagues and her work with aplomb. In working with her team, Ashley showed the ability to step back to allow others to shine—a mature insight few have and even fewer manage to incorporate into their approach with the grace and consideration Ashley showed to her fellow group members.

Ashley also displayed strong research and writing skills. She wrote two sentencing memos and a letter to the Court about our access to a client and the prison conditions he faced during COVID. Her sentencing letters reflected great insight and thought about our case theories for each client. She delicately balanced the emotive plea with the law and logical reasoning, a task often too hard for the less experienced, but something Ashley honed through our editing process. Ashley's access-to-client letter also suggested a comfort with balancing formality with the letter's informative aspects. Her dedication and determination resounded in her numerous attempts to get each document right. Ashley also researched Power of Attorney laws in North Carolina for a client looking to set up a business as part of his reentry plan. This task involved sending a possible contract to our client. However, it proved to be trickier than expected because of the complicated legal implications in North Carolina for granting a Power of Attorney. Ashley elegantly navigated the possible pitfalls for our client and ensured our client understood the implications. All of her writing and research reflected her extraordinary attention to detail and her well-deserved confidence in her abilities.

I know Ashley can handle Your Honor's caseload, as I watched her balance multiple projects with varying demands at the same time. While she was drafting and editing the sentencing letters, she and her teammates also oversaw a large discovery project and several client interviews, all of which she handled with poise and determination. She came excellently prepared for each assignment, despite each case's demands and her obligations as Moot Court EIC.

From beginning to end, Ashley was special: a go-getter with intelligence to match, and charm to mask the grit she exhibited for her clients. I have no doubt that she will assist Your Honor in understanding cases' contours and resolving difficult disputes. Perhaps most important given the intimate work environment associated with clerkships, Ashley was a positive force in the group dynamic—an excellent, upbeat team member—even amidst numerous, weighty responsibilities. She knows the value and importance of hard work, but also of treating others with respect and empathy. She earned her place at the top of Fordham's class of 2021, and, if given the chance, she will impress in your Chambers. I recommend her to you without reservation and welcome any further inquiry that you may have regarding Ashley.

Sincerely,

Michael W. Martin
Associate Dean for Experiential Learning,
Director of Clinical Programs, and
Clinical Professor of Law

Michael Martin - mwmartin@fordham.edu

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WRITING SAMPLE

The attached writing sample was submitted as a Memorandum of Law in opposition to a Summary Judgment Motion for the Civil Litigation Drafting Course taught by Professor Connolly at Fordham University School of Law. The attached version is the original, unedited paper. It is being submitted with express approval of Professor Connolly.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KATE SHELTON, Plaintiff, v. DERBY & AVON, LLC, Defendant.	:	20 Civ. 6789 (PMN)

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

Plaintiff Kate Shelton ("Shelton") respectfully submits this memorandum of law in opposition to the Defendant's motion for summary judgment.

Shelton filed a complaint against the Defendant, Derby & Avon ("the Firm"), because it discriminated and retaliated against her in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e ("Title VII"). The Defendant has filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. This motion should be denied.

There is a genuine issue of fact as to whether the Defendant discriminated against Shelton because of her sex when the Defendant promoted a male employee over Shelton. The managing partner stated he thought it would be beneficial to have one woman and one man as the two Paralegal Supervisors. Since the then Paralegal Supervisor was a woman, the managing partner promoted the male employee. There is a genuine issue of fact as to what the managing partner meant by these statements and it should be left to the trier of fact to decipher. Thus, Shelton's claim of sex discrimination must survive summary judgment.

The Defendant's motion for summary judgment on Shelton's claim of retaliation should also be denied because there is a genuine issue of fact as to whether the Defendant's proffered "non-retaliatory" reasons are pretextual. The temporal proximity of the retaliatory action along with the Defendant's inconsistent statements demonstrate the alleged reason provided for assigning Shelton to work with her past abuser is merely pretextual. Regarding temporal proximity, the male employee that was promoted to Paralegal Supervisor assigned Shelton to work with another employee who had previously sexually assaulted her. This assignment occurred the day after the Defendant rejected the mediation offer from the Equal Employment Opportunity Commission ("EEOC"). As for the Defendant's inconsistent statements, one of the

Defendant's non-retaliatory reasons for assigning Shelton to work with her past abuser is because the client demanded it. However, this is inconsistent with the client's own statements. The client stated he left the decision to the Defendant's employees. Further, the Defendant's offered statements as to what the new, male Paralegal Supervisor knew about the past abuse was also inconsistent. Shelton and the employee who abused her both mentioned the allegations to the new, male Paralegal Supervisor, but in his own testimony, the Paralegal Supervisor stated he knew very little about the subject. The temporal proximity of the retaliatory action and the Defendant's inconsistent statements demonstrate there is a genuine issue of fact regarding the validity of the non-retaliatory reason provided by the Defendant.

It should be left to a jury to decide whether Shelton's sex was a motivating factor in the decision not to promote her and whether the Defendant's non-retaliatory reasons are pretextual. As such, Shelton's retaliatory claim should survive summary judgment.

BACKGROUND

I. The Defendant's Decision to Promote a Male Employee over Shelton

Shelton has been a paralegal at the Firm for fourteen years. *See* Background Facts ("Bkgd.") at p. 1. Shelton is female. *Id.* She was promoted four years ago to the position of Senior Paralegal. Bkgd. at p. 1. Being promoted to Senior Paralegal shows that Shelton had "distinguished herself among her peers." *See* Deposition of Claire Danbury ("Danbury Dep.") at p. 83–86. Shelton's supervisors have also consistently reviewed her at the Firm's highest mark—"exceeds expectations"—for the past ten years. *Id.* She has qualified each of those years for a performance bonus. *Id.*

When David Weston ("Weston"), the managing partner at the Firm, announced he was soliciting applications for the recently vacant Paralegal Supervisor position, he stated the Firm

was looking for individuals with "mature judgment, people skills, and initiative." Document #8 at p. 1. Weston requested everyone interested to submit their resumes. *Id.* He stated that he would also be considering an applicant's annual evaluations. *Id.* Shelton, a Senior Paralegal with fourteen years of experience, applied for the position. Bkgd. at p. 3. Tom Bristol ("Bristol"), a male paralegal who had been at the Firm for two years, also applied. *See id.* at p. 2, 3. Weston chose to promote Bristol over Shelton. *See* Deposition of David Weston ("Weston Dep.") at p. 75. Before announcing his decision, Weston called a meeting with the then-current Paralegal Supervisors, Claire Danbury ("Danbury") and Bob Litchfield ("Litchfield") to let them know he had chosen Bristol. *See* Deposition of Claire Danbury ("Danbury Dep.") at p. 83–86; Weston Dep. at p. 75. Both Danbury and Litchfield told Weston that Shelton should have received the promotion. *See* Weston Dep. at p. 75. Weston responded that with Danbury as the other paralegal supervisor "it was a good idea to make sure one of the Paralegal Supervisors was a man and one was a woman." Danbury Dep. at p. 83–86. Danbury later told Shelton "[Weston] wanted a young guy, and [Bristol] was his man." Bkgd. at p. 4.

Shelton approached Weston about the decision to promote Bristol. Bkgd. at p. 5. Weston responded that it was a "management decision" and refused to discuss it further with her. *Id.* Shelton decided to take action. *Id.*

II. The Defendant's Decision to Assign Shelton to Work with an Employee who Had Sexually Assaulted Her

On February 14, 2020, Shelton filed a discrimination complaint with the EEOC. *See* Compl. ¶ 36; Weston Dep. at p. 138. The Defendant learned of the complaint when the EEOC investigated Shelton's charges. *See* Compl. ¶ 37; Weston Dep. at p. 138. On July 14, 2020, the Defendant rejected the EEOC's offer to mediate. *See* Compl. ¶ 37; Bkgd. at p. 5. The next day,

Bristol assigned Shelton to work with Mike Simsbury ("Simsbury"). *See* Compl. ¶ 38; Bkgd. at p. 5. As the Defendant and Bristol knew, Simsbury had sexually harassed and sexually assaulted Shelton. *See* Compl. ¶ 32; Deposition of Bob Litchfield ("Litchfield Dep.") at p. 45; Deposition of Kate Shelton ("Shelton Dep.") at p. 324.

Starting in 2016, Simsbury consistently yelled at Shelton, fabricated deadlines causing her to miss events for her other career, and invaded her personal space inappropriately. Bkgd. at p. 6. During one of Shelton's assignments with Simsbury, Simsbury told Shelton to go to the supply room to grab certain supplies he needed. *Id.* As she was doing so, Simsbury blocked Shelton into the supply room and told her that he would hurt her unless she had sex with him. *See* Litchfield Dep. at p. 45; Compl. ¶ 34. Shelton reported this incident to Litchfield. Bkgd. at p. 7. Thereafter, Shelton never worked with Simsbury again. *See* Litchfield Dep. at p. 45.

It was not until the day after the Firm rejected the EEOC's mediation offer that Shelton was assigned to work with Simsbury by Bristol. *See* Bkgd. at p. 5. The Defendant alleged this was because of a request by a client. *See* Deposition of Tom Bristol ("Bristol Dep.") at p. 92. John Torrington ("Torrington"), the client, called Weston to discuss staffing on the new case the Firm was handling. Deposition of John Torrington ("Torrington Dep.") at p. 32. Torrington suggested Simsbury and Shelton be assigned to his case. *Id.* However, Torrington told Weston that he would "leave it to his judgment how to put together a team." *Id.* Soon thereafter, Simsbury called Torrington to thank him for the opportunity to work on his case and asked who he should staff on the case. *Id.* Torrington told Simsbury "[you're] the captain of the ship; I trust you to get the very best." *Id.* Torrington mentioned Shelton as a possibility for staffing, but ultimately told Simsbury "it is your call." *Id.* In Torrington's email the next day to Weston,

Torrington further reiterated "I'm leaving all the staffing up to [Weston] and [Simsbury]." Document #4 at p. 1.

Simsbury then called Bristol about the case. Bristol Dep. at p. 92. Simsbury told Bristol that Shelton "might not be happy" to be assigned to work with him because she thought he was an "abusive monster." Deposition of Mike Simsbury ("Simsbury Dep.") at p. 72–73. Bristol then told Shelton he was assigning her to work with Simsbury. Shelton Dep. at p. 324. Shelton told Bristol of Simsbury's past abuse. *Id.* Bristol responded that it seemed like "ancient history to him." *Id.*

ARGUMENT

I. Summary Judgment Standard

At the motion for summary judgment stage, the court is not responsible for resolving issues of fact, but rather assessing whether there are genuine issues of material fact that remain to be tried. *See Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir. 1986) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 246–50 (1986)). At this stage, all reasonable inferences and ambiguities are construed in the light most favorable to the non-moving party. *See Singer v. Ferro*, 711 F.3d 334, 339 (2d Cir. 2013).

II. The Defendant Fails to Satisfy Summary Judgment Because There Is a Genuine Issue of Material Fact Whether Shelton's Sex Was a Motivating Factor in the Defendant's Decision Not to Promote Her

To be granted summary judgment, the Defendant must prove that there is no genuine issue of material fact. *See Knight*, 804 F.2d at 11. Here, the Defendant cannot meet that burden because the Defendant violated Title VII in not promoting Shelton, either entirely or partly, because of her sex.

Title VII makes it unlawful for an employer to discriminate against individuals because of their sex. 42 U.S.C. § 2000e-2(a)(1). Title VII is violated when an employment decision, such as a failure to promote, is "based in whole or in part on discrimination." *See Feingold v. New York*, 366 F.3d 138, 152 (2d Cir. 2004); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). In order to prevail, a plaintiff is only required to prove that sex was a motivating factor, even if other factors came into play. *See* 42 U.S.C. § 2000e-2(m).

To prove a claim under Title VII, the courts follow an evidentiary burden-shifting framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973); *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 252–53 (1981). First, the plaintiff must establish a *prima facie* case. *See McDonnell Douglas Corp.*, 411 U.S. at 802. Once this has been established, the *prima facie* case creates a presumption the defendant discriminated against the plaintiff. *Tex. Dep't of Cmty. Affs.*, 450 U.S. at 252–53. Second, this then places a burden on the defendant to show a "legitimate, nondiscriminatory reason" for the employer's action. *See McDonnell Douglas Corp.*, 411 U.S. at 802. Third, if the defendant meets this burden, the presumption against the defendant "drops from the case" and the plaintiff must then show by a preponderance of the evidence that the defendant's actions were motivated by discrimination. *See Tex. Dep't of Cmty. Affs.*, 450 U.S. at 253; *McDonnell Douglas Corp.*, 411 U.S. at 804; *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507–08 (1993).

Shelton's claim of sex discrimination must not be dismissed because she has established (1) a *prima facie* case of discrimination and (2) that her sex was a motivating factor in the Defendant's decision not to promote her.

A. Shelton Has Established a *Prima Facie* Case for Sex Discrimination

Shelton is a qualified female employee of the Defendant whom it chose not to promote either partly or entirely because of her sex. For plaintiffs to prove a *prima facie* case for sex discrimination in a case involving a failure to promote, they must prove (1) they are a member of a protected class, (2) they were qualified for the position sought, (3) they were denied the promotion to said position, and (4) it was surrounding circumstances giving rise to an inference of discrimination. *See McDonnell Douglas Corp.*, 411 U.S. at 802; *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d. 93, 101 (2d Cir. 2001); *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 711–12 (2d Cir. 1998). The burden to establish a *prima facie* case is a light one. *See Tex. Dep't of Cmty. Affs.*, 450 U.S. at 253; *see also Byrnie*, 243 F.3d. at 101.

Shelton is a female who has been a paralegal at the Firm for fourteen years. *See* Bkgd. at p. 1. She was promoted to the position of Senior Paralegal four years ago. Bkgd. at p. 1. Shelton's supervisors have consistently reviewed her at the Firm's highest mark—"exceeds expectations"—for the past ten years. Bkgd. at p. 1. When Weston announced he was soliciting applications for the recently vacant Paralegal Supervisor position, Shelton applied. Bkgd. at p. 3. Weston stated in the email the Firm was looking for individuals with "mature judgment, people skills, and initiative." Document #8 at p. 1. Weston chose to promote Bristol over Shelton. *See* Weston Dep. at p. 75. Weston stated that with Danbury as the other paralegal supervisor "it was a good idea to make sure one of the Paralegal Supervisors was a man and one was a woman." Danbury Dep. at p. 83–86.

Here, Shelton has established a *prima facie* case of sex discrimination. First, as Shelton is female, she falls under the protected class of sex. *See* 42 U.S.C. § 2000e-2(a)(1). Second, given Shelton's exemplary history of positive reviews and bonuses at the Firm, she was more

than qualified for the position. *See* Bkgd. at p. 1. Third, she was denied the promotion as Weston chose to promote Bristol over her. *See* Weston Dep. at p. 75. Fourth, according to Weston's statements to Danbury, Weston did not promote Shelton because she was female and that would mean having two female Paralegal Supervisors, instead of having one male and the other female. *See* Danbury Dep. at p. 83–86. As such, Weston hired Bristol over Shelton because of Shelton's sex and thus discriminated against her. Thus, Shelton has satisfied the first step in the burden-shifting framework.

B. Shelton's Sex Was a Motivating Factor in the Decision Not to Promote Her

The Defendant violated Title VII because Shelton's sex was a motivating factor in the decision not to promote her. After a defendant has proffered a reason for its actions, the plaintiff must then show by a preponderance of the evidence that the defendant's actions were motivated by discrimination rather than the offered reason. *See McDonnell Douglas Corp.*, 411 U.S. at 804; *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507–08 (1993). A plaintiff is only required to prove that sex was a motivating factor, "even though other factors also motivated the practice." *See* 42 U.S.C. § 2000e-2(m).

After an employer gives a non-discriminatory reason, the plaintiff must provide evidence that supports "a reasonable inference that prohibited discrimination occurred." *James v. N.Y. Racing Ass'n*, 233 F.3d 149, 156 (2d Cir. 2000). To determine whether a plaintiff has met this evidentiary burden, the courts look to the strength of the plaintiff's *prima facie* case, the evidence proffered by the plaintiff to prove the employer's reasoning false, and other evidence supporting the employer's claim. *See id.* at 148–49. The Second Circuit has repeatedly cautioned granting summary judgment motions where "the merits turn on a dispute as to the employer's intent." *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 101 (2d Cir. 2010).

However, even under this standard, a plaintiff must show "conclusory allegations" and more than just doubt regarding material facts to survive a motion for summary judgment. *See id.*

Weston told Danbury that "it was a good idea to make sure one of the Paralegal Supervisors was a man and one was a woman." Danbury Dep. at p. 83–86. This statement demonstrates Shelton was not chosen for the promotion because of her sex. Regardless of whether other factors are involved, a motivating factor here was Shelton's sex.

While it may only be one statement by Weston, this one statement is the basis for why Shelton was not promoted. In *Jain v. Tokio Marine Management Inc.*, the Southern District of New York found that one statement about the plaintiff not being the right cultural fit was sufficient to allow the dispute to go to trial. No. 16 CV 8104, 2018 WL 4636842, at *7 (S.D.N.Y. Aug. 27, 2018). Under the plaintiff's theory of the case in *Jain*, this statement was the basis of the employer's decision not to promote him. *See id.* The court noted that even one isolated instance could be "enough to create a reasonable question of fact for a jury." *See id.* (quoting *Abrams v. Dep't of Pub. Safety*, 764 F.3d 244, 253 (2d Cir. 2014)). Here, the same is true. While Weston may have only provided one statement on preferring to hire a man with Danbury, this is sufficient to uphold the claim. In the light most favorable to the non-moving party, Weston's statement demonstrates he discriminated against Shelton by not choosing her for the position because of her sex. His statement is the basis of why Shelton did not receive the promotion. As such, Shelton's claim must survive summary judgment.

This is true regardless of the Defendant's claim that Weston was solely referring to a comment that Danbury herself had made. *See* Weston Dep. at p. 75. The ambiguity of whether Weston affirmatively stated the comment or was only referring to Danbury's remarks is a

decision left to the trier of fact. Thus, it cannot be used to dismiss the claim at the summary judgment stage.

Further, Shelton need not invalidate all the nondiscriminatory reasons offered by the Defendant, but rather must only show her sex was a motivating factor. A plaintiff is only required to prove that sex was a motivating factor, "even though other factors also motivated the practice." *See* 42 U.S.C. § 2000e-2(m). The Defendant alleged a few "nondiscriminatory" reasons as to why Bristol was promoted over Shelton. *See* Memorandum of Law in Support of Motion for Summary Judgment of the Defendant ("Def. Mot. Summ. J.") at p. 10–11. However, this is not sufficient to satisfy dismissing the claim at the motion for summary judgment stage. While the other reasons provided by the Defendant may have impacted Weston's decision, the statute only requires the plaintiff to provide that sex was a motivating factor, even if it is one among others. Shelton has done so here. As such, the dispute must be allowed to go to trial.

III. There Is a Genuine Issue of Material Fact Whether the Firm's Action of Assigning Shelton to Work with Simsbury, whom It Knew Had Sexually Assaulted Her, Constitutes Retaliation

To be granted summary judgment, the Defendant must prove that there is no genuine issue of material fact. *See Knight*, 804 F.2d at 11. Here, the Defendant cannot meet that burden because the Defendant violated Title VII when they retaliated against her by assigning her to work with Simsbury.

Title VII makes it unlawful for an employer to retaliate against a plaintiff for bringing an action under Title VII. *See* 42 U.S.C. § 2000e-3(a). A retaliation claim is subject to the same burden-shifting framework as the claim for sex discrimination. *See Apionishev v. Colum. Univ.*, No. 09 Civ. 6471, 2012 WL 208998, at *7 (S.D.N.Y. Jan. 23, 2012) (citing *McDonnell Douglas*

Corp., 411 U.S. 792). As such, plaintiffs must first establish a *prima facie* case. *See Tex. Dep't of Cmty. Affs.*, 450 U.S. at 252–53. Then, defendants must provide a non-retaliatory reason. *See id.* at 254. Finally, plaintiffs then get an opportunity to rebuff the defendant's proffered reasons. *See id.* at 256.

Shelton's claim of retaliation must not be dismissed because she has established (1) a *prima facie* case of retaliation and (2) has rebuffed the Defendant's proffered reasons by demonstrating inconsistencies in the Defendant's statements.

A. Shelton Has Established a *Prima Facie* Case for Retaliation

To establish a *prima facie* case for a claim of retaliation, plaintiffs must plausibly allege that (1) they were engaged in a protected activity, (2) the defendant knew of the activity, (3) the defendant took adverse action against them, and (4) there was a causal connection between the action and the protected activity. *See Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 90 (2d Cir. 2015).

On February 14, 2020, Shelton filed a discrimination complaint with the EEOC. *See* Compl. ¶ 36; Weston Dep. at p. 138. The Defendant learned of the complaint when the EEOC investigated Shelton's charges. *See* Compl. ¶ 37; Weston Dep. at p. 138. On July 14, 2020, the Defendant rejected the EEOC's offer to mediate. *See* Compl. ¶ 37; Bkgd. at p. 5. The next day, Bristol assigned Shelton to work with Simsbury. *See* Compl. ¶ 38; Bkgd. at p. 5. As the Firm and Bristol knew, Simsbury had sexually harassed and sexually assaulted Shelton. *See* Compl. ¶ 32; Deposition of Bob Litchfield ("Litchfield Dep.") at p. 45; Deposition of Kate Shelton ("Shelton Dep.") at p. 324. In 2016, Simsbury blocked Shelton into a supply room and told her that he would hurt her unless she had sex with him. *See* Litchfield Dep. at p. 45; Compl. ¶ 34. Shelton reported this incident to Litchfield and thereafter never worked with him again. *See*

Litchfield Dep. at p. 45. It was not until the day after the Firm rejected mediation with the EEOC that Shelton was assigned to work with Simsbury by Bristol. *See* Bkgd. at p. 5. The Defendant alleged this was because of a request by a client. *See* Bristol Dep. at p. 92. However, the client stated that while it made sense for Shelton to join the team because he had worked with her before, he would leave "all of the staffing up to [Weston] and [Simsbury]." *See* Document #4 at p. 1.

Shelton has established a *prima facie* case for her claim of retaliation. As to the first requirement of a *prima facie* case, a protected activity under Title VII includes filing a formal complaint or instituting litigation. *See* 42 U.S.C. § 2000e–3(a); *Giscombe v. N.Y. City Dep't of Educ.*, 39 F. Supp. 3d 396, 401 (S.D.N.Y. 2014). Shelton engaged in a protected activity of filing a claim with the EEOC. As to the second requirement of whether the Defendant knew, Weston, the managing partner at the Firm, stated he knew of the complaint. *See* Weston Dep. at p. 138. As for the third requirement, an action taken by an employer is considered adverse when that action would dissuade a reasonable person from supporting a claim of discrimination. *See Vega*, 801 F.3d at 90. Assigning Shelton to work with Simsbury who had previously harassed her sufficiently meets this requirement.

As for the final requirement of causation, a plaintiff must plausibly allege a causal connection between the adverse action taken and the protected activity. *See* 42 U.S.C. § 2000e-3(a); *Vega*, 801 F.3d at 90. Courts have recognized that retaliation is usually not committed openly, thus a causal connection can be shown indirectly by the temporal proximity of the events. *See Giscombe*, 39 F. Supp. 3d at 402; *Sanders v. N.Y.C. Hum. Res. Admin.*, 361 F.3d 749, 755 (2d Cir. 2004); *Cifra v. Gen. Elec. Co.*, 252 F.3d 205, 217 (2d Cir. 2001). Bristol retaliated against Shelton by assigning her to work with Simsbury *the day after* the Firm rejected the

mediation offer from the EEOC. *See* Bkgd. at p. 5. This is exceedingly close in time and thus satisfies the final requirement of causation.

Bristol's action of retaliation should be the action used in evaluating the causation requirement because it was intended to dissuade Shelton from bringing a claim. When courts look to claims of retaliation, they review whether a reasonable person in the plaintiff's position would feel dissuaded "from complaining or assisting in complaints about discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 70 (2006). Here, Shelton had yet to bring a claim to court, but at the time had every right to do so. Bristol's tactic of assigning Shelton to work with Simsbury can be seen as an attempt to scare her from bringing a claim. Thus, this claim should survive summary judgment to allow a trier of fact to determine whether a reasonable person in Shelton's situation would feel dissuaded from filing a complaint.

Even if this court decided to consider the time Shelton filed the complaint rather than Bristol's actions in evaluating the causation requirement, it is still sufficiently close in time to demonstrate a causal connection. The Second Circuit has never drawn a hardline rule for the maximum time period for the causal connection requirement. *See Nagle v. Marron*, 663 F.3d 100, 111 (2d Cir. 2011). Further, with regards to Title VII claims, a charging party can only request a right to sue letter from the EEOC 180 days after it was first filed. *See* 29 C.F.R. § 1601.28. Shelton filed her complaint with the EEOC on February 14, 2020. *See* Bkgd. at p. 5; Weston Dep. at p. 138. Thus, the earliest Shelton could have requested a right to sue letter from the EEOC would have been May 14, 2020. As such, if this court were to consider the time Shelton could have filed a complaint, this should be the date that should be referenced. In that case, the time between Shelton being able to request to sue and Bristol assigning her to work with Simsbury is two months and a day. This is a short enough time period to permit a trier of

fact to infer a causal connection and thus satisfies the temporal element of the causation requirement.

B. The Inconsistencies in the Defendant's Proffered "Non-retaliatory" Reasons Demonstrate There Is a Genuine Issue of Material Fact Whether the Proffered Reasons Are Pretextual

After a defendant has proffered a non-retaliatory reason for the adverse action taken, the plaintiff must then provide evidence to demonstrate these reasons are merely pretextual. *See Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 845 (2d Cir. 2013). Temporal proximity alone is not sufficient to satisfy this burden. *See El Sayed v. Hilton Hotels Corp.*, 627 F.3d 931, 933 (2d Cir. 2010). However, plaintiffs may rely on the temporal proximity, as proven in their *prima facie* case, along with other evidence such as inconsistencies in the defendant's reasoning to defeat summary judgment. *See Zann Kwan*, 737 F.3d at 847. "Weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in the defendant's explanations demonstrate pretext as they show the defendant did not actually act for those reasons. *Clarke v. Pacifica Found.*, No. 07 Civ. 4605, 2011 WL 4356085, at *9 (E.D.N.Y. Sept. 16, 2011).

In combination with the evidence of temporal proximity as shown in Shelton's *prima facie* case, there are also inconsistencies in the Defendant's proffered reasons demonstrating they are a mere pretext. With regards to Bristol assigning Shelton to work with Simsbury, there are two inconsistencies in the Defendant's proffered reasons. First, the alleged reason that the client needed to have Shelton on the case is directly contradicted by statements from said client. Second, there have been inconsistent statements about Bristol knowing of Simsbury's past abusive conduct towards Shelton.

As to the first inconsistency, the client did not demand that Shelton had to work on the matter. Torrington, the client himself, stated that when he suggested for Shelton to be assigned to his case he also told Simsbury, "it is your call." Torrington Dep. at p. 32. In Torrington's email to Weston, he further reiterated "I'm leaving all the staffing up to [Weston] and [Simsbury]." Document #4 at p. 1. Yet, when Bristol assigned Shelton to this matter with Simsbury, Bristol stated that he did not have a choice in the matter. *See* Shelton Dep. at p. 324. Here, there are significant inconsistencies in what the client actually requested and how Bristol handled that request. Torrington merely made a suggestion, whereas Bristol used this suggestion to demand Shelton to work with Simsbury. The leap from suggestion to demand from Torrington to Bristol demonstrates an inconsistency in the Defendant's explanation reinforcing that the non-retaliatory reason is merely pretextual.

As to the second inconsistency, there is conflicting testimony from the Defendant on what Bristol knew about the history between Shelton and Simsbury. Simsbury, himself, stated that he told Bristol that Shelton "might not be happy" to be assigned to work with him because she thought he was an "abusive monster." Simsbury Dep. at p. 72–73. Further, Shelton also stated she had told Bristol of Simsbury's past abuse when Bristol tried to assign her to work with him. *See* Shelton Dep. at p. 324. Bristol responded to Shelton by stating the sexual assault seemed like "ancient history to him." *Id.* Bristol, however, stated he had only heard rumors that Shelton and Simsbury had dated. *See* Bristol Dep. at p. 92. Bristol further did not mention that Simsbury had told him Shelton thought Simsbury was an "abusive monster." *See id.* Bristol's statement directly contradicts both Simsbury's and Shelton's statements that Bristol knew about Simsbury's past abusive conduct. This contradiction further reinforces that the reasoning proffered by the Defendant is pretextual.

Regardless of whether this court finds the inconsistencies in the Defendant's statement to demonstrate the Defendant's reasons are pretextual, there are sufficient inconsistencies to survive summary judgment as there is a genuine issue of material fact whether the proffered reasons are pretextual or not.

CONCLUSION

There are genuine issues of fact as to whether the Defendant discriminated against Shelton because of her sex and whether the Defendant retaliated against her because of her claim that must be left for the trier of fact to evaluate. As such, the court must deny the Defendant's motion for summary judgment.

Dated: New York, New York
December 6, 2020

CONNOLLY & CONNOLLY
Attorneys for Plaintiff

By: /s/ Ashley Slater
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Applicant Details

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Applicant Education

BA/BS From	**Touro College**
Date of BA/BS	**June 2019**
JD/LLB From	**Benjamin N. Cardozo School of Law, Yeshiva University** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=23314&yr=2010**
Date of JD/LLB	**May 31, 2023**
Class Rank	**20%**
Law Review/ Journal	**Yes**
Journal(s)	**Cardozo Journal of Conflict Resolution**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Monrad G. Paulsen Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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June 7, 2023

Hon. Kiyo A. Matsumoto
U.S. District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Dear Judge Matsumoto,

Please consider my application for a clerkship in your chambers for the 2025-2026 term. I am a recent law school graduate, and I will be starting an associate position with Weil, Gotshal & Manges LLP's Litigation Department this October. By the time the clerkship begins, I will have had two years of commercial litigation experience.

I believe my religious background and life experiences will bring diversity to your chambers as I hope to bring to the practice of law. I am a proud Hasidic Jew. I belong to one of the most secluded sects within the Orthodox Jewish community. People like me have likely appeared before you as litigants, and you may have sentenced someone like me to prison time. However, I would wager you have never had a Hasidic lawyer in your courtroom and certainly never a Hasidic law clerk. Traditionally, Hasidic Jews have rarely pursued college degrees. Hasidic lawyers are practically unheard of. However, old trends are changing. I am part of a new movement of young Hasidic professionals who are trying to make their way in professions where Hasidic Jews have been historically absent.

I believe I can make the most impact on my community by becoming a federal prosecutor. Many in my community are distrustful of law enforcement and the judicial system. They feel that their atypical lifestyle, appearance, and language make it hard for juries and judges to understand them. The Hasidic and Orthodox communities have also borne the brunt of the enormous uptick in hate crimes in New York City. Orthodox Jews were victims in 94 percent of the 194 antisemitic assaults that occurred between 2018 and 2022. My community does not feel safe because of who they are. It would be the highest use of my skills to serve as an Assistant United States Attorney, by increasing the criminal justice system's legitimacy in the eyes of my community and bringing violent and hateful offenders to justice. I also hope to be a trailblazer within my community and that my successes encourage others to follow my path. In this day and age, society values diversifying our institutions to look more like the people they serve. I want to make our court system more reflective of our district by clerking for you and later doing my part in our criminal justice system.

Enclosed please find my resume, law school transcript, writing sample, and three letters of recommendation. Please let me know if I can provide any additional information. Thank you very much for considering my application. I look forward to hearing from you.

Respectfully,

Avraham Snider

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EXPERIENCE

WEIL, GOTSHAL & MANGES LLP, New York, NY
Associate, Complex Commercial Litigation, Beginning October 2023
Summer Associate, May–July 2022
Staffed on a Supreme Court case argued during the 2022-23 term. Drafted the background section of a memorandum of law for a class certification motion in a pro bono civil rights case.

UNITED STATES ATTORNEY'S OFFICE FOR THE SOUTHERN DISTRICT OF NEW YORK, New York, NY
Legal Intern, Criminal Division, January 2023–April 2023
Assigned to the Public Corruption Unit and the Securities and Commodities Fraud Task Force. Drafted the government's response brief in an appeal from the denial of a compassionate release motion. Drafted research memoranda on immunity and criminal law questions. Assisted in securities fraud investigations. Observed multiple high-profile and complex cases from the initial proffer stage through trial.

NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE, New York, NY
Student Assistant District Attorney, Prosecutor Practicum Clinic, September 2022–December 2022
Participated in an intensive full-time clinic at the Manhattan District Attorney's Office. Assigned to Trial Bureau 60. Served as the primary attorney on misdemeanor cases pursuant to student practice rules. Responsibilities included conducting investigations, securing supporting affidavits, providing discovery, responding to defense motions, engaging in plea negotiations, and preparing for trials. (Charges included N.Y. Penal Law §§ 155.25, 165.40, and 165.71.) Second-chaired a week-long felony jury trial from pretrial motions through verdict. Appeared on the record in Criminal Court Part C to assist with case scheduling, trial readiness, extraditions, and dismissals. Screened and wrote up non-felony cases in the complaint room, which included conferring with police officers, assessing evidence, and recommending charges and plea offers.

HON. REGGIE B. WALTON, U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, Washington D.C.
Judicial Intern, May 2021–August 2021
Drafted a memorandum opinion in response to a motion and cross-motion for summary judgment in a Freedom of Information Act case. Prepared a bench memorandum on a motion for a preliminary injunction in an Administrative Procedures Act challenge. Observed motion hearings, arraignments, pleas, sentencings, bond hearings, settlement and status conferences, and other daily district court proceedings. Discussed courtroom observations, effective advocacy strategies, and substantive legal issues with Judge Walton.

EDUCATION

BENJAMIN N. CARDOZO SCHOOL OF LAW, New York, NY
Juris Doctor, *cum laude*, May 2023
Class Rank: Top 20 %
Honors: CARDOZO JOURNAL OF CONFLICT RESOLUTION *Senior Articles Editor (Vol. 24), Staff Editor (Vol. 23)*; Monrad G. Paulsen Moot Court Competition (2021), *Finalist*; *Teaching Assistant* to Professor Peter Goodrich, Contracts I (fall 2020), Contracts II (spring 2021); Dean's Honor Roll, 2020-21 Academic Year; Dean's Merit Scholarship
Associations: American Bar Association; New York City Bar Association; Jewish Law Students Association; Cardozo Mentors Program

TOURO UNIVERSITY, Brooklyn, NY
Bachelor of Arts in Political Science, *summa cum laude*, June 2019
Honors: Dean's List (all semesters); Popack Scholarship; Dean's Scholarship
Publication: *The Singapore Summit: A Paradigmatic Analysis*, 7 POLIS: THE TOURO COLLEGE POLITICAL SCIENCE JOURNAL 31 (2019)

LANGUAGE SKILLS & INTERESTS

Languages: Hebrew (fluent); Yiddish (fluent)
Interests: Amateur mixologist; Home cook; Historical biography enthusiast

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PROFESSIONAL REFERENCES

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GARY J. GALPERIN
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ADA Galperin was my clinical professor and supervisor during my full-time internship at the Manhattan District Attorney's Office

Date Issued: 09-JUN-2023

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Avraham Snider
Last 4 SSN: *****8639
Date of Birth: 08-JAN
Level of Study: **First Professional**

Only Admit: Summer 2020

Comments:
Writing Requirement Completed -- 03-07-2023

Degree Awarded Juris Doctor 31-MAY-2023
Ehrs: 87.000 QPts: 235.003
GPA-Hrs: 66.000 GPA: 3.560
Associated Program Information
Program : Juris Doctor
College : Cardozo School of Law
Major : Law
Inst. Honors: Cum Laude

INSTITUTION CREDIT:

Summer 2020
JD Cardozo School of Law
Law
New First Time

SUBJ	NO.	COURSE TITLE	CRED	GRD	R
LAW	6003	Contracts Goodrich, Peter	5.000	A	
LAW	6202	Elements of the Law Newman, Leslie	2.000	A-	
LAW	6501	Constitutional Law I Adams, Michelle	3.000	A-	

Ehrs: 10.000 QPts: 38.335
GPA-Hrs: 10.000 GPA: 3.833

Fall 2020
JD Cardozo School of Law
Law
Continuing

SUBJ	NO.	COURSE TITLE	CRED	GRD	R
LAW	6300	Civil Procedure Gilles, Myriam	5.000	A-	
LAW	6703	Torts Buccafusco, Chris	4.000	B+	
LAW	6790	Lawyering & Legal Writing I Ryan, Linda	1.000	B+	
LAW	7900	Teaching Assistant Goodrich, Peter	1.000	P	

Ehrs: 11.000 QPts: 35.000
GPA-Hrs: 10.000 GPA: 3.500

Spring 2021
JD Cardozo School of Law
Law
Continuing

SUBJ	NO.	COURSE TITLE	CRED	GRD	R
LAW	6101	Criminal Law Levine, Katherine	3.000	B+	
LAW	6403	Property Sterk, Stewart	5.000	A-	
LAW	6793	Lawyering & Legal Writing II Ryan, Linda	2.000	B+	
LAW	7900	Teaching Assistant Goodrich, Peter	1.000	P	

Ehrs: 11.000 QPts: 35.000
GPA-Hrs: 10.000 GPA: 3.500

********** CONTINUED ON NEXT COLUMN **********

Institution Information continued:

Fall 2021
JD Cardozo School of Law
Law
Continuing

SUBJ	NO.	COURSE TITLE	CRED	GRD	R
LAW	7325	Pretrial Practice Todres, Debra	3.000	A	
LAW	7330	Evidence Okidegbe, Ngozi	4.000	B+	
LAW	7521	Administrative Law Herz, Michael	3.000	B+	
LAW	7547	Employment Law Weisenfeld, David	3.000	B	
LAW	7925	Jrnl of Conflict Resolution Love, Lela	0.000	P	
LAW	7953	Paulsen Competition Lipshie, Burton	1.000	P	

Ehrs: 14.000 QPts: 44.331
GPA-Hrs: 13.000 GPA: 3.410

Spring 2022
JD Cardozo School of Law
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Continuing

SUBJ	NO.	COURSE TITLE	CRED	GRD	R
LAW	7032	Commercial Law Schroeder, Jeanne	4.000	A	
LAW	7060	Corporations Wansley, Matthew	4.000	B	
LAW	7301	Federal Courts Rudenstine, David	3.000	A-	
LAW	7925	Jrnl of Conflict Resolution Love, Lela	1.000	P	

Ehrs: 12.000 QPts: 39.001
GPA-Hrs: 11.000 GPA: 3.545

Summer 2022
JD Cardozo School of Law
Law
Continuing

SUBJ	NO.	COURSE TITLE	CRED	GRD	R
LAW	7790	Advanced Legal Research Pal, Anupama	1.000	HP	

Ehrs: 1.000 QPts: 0.000
GPA-Hrs: 0.000 GPA: 0.000

Fall 2022
JD Cardozo School of Law
Law
Continuing

SUBJ	NO.	COURSE TITLE	CRED	GRD	R
LAW	7366	Prosecutor Practicum Galperin, Gary	10.000	P	
LAW	7367	Criminal Justice Soc Colloqu Galperin, Gary	2.000	A-	
LAW	7926	Jrnl of Conflict Res Board Schneider, Andrea	1.000	P	

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